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Case No. 65-75

In The

APPELLATE COURT OF ILLINOIS

Third District

Abstract

A.D. 1966

COUNTY BOARD OF SCHOOL TRUSTEES OF MARSHALL COUNTY, ILLINOIS; COMMUNITY UNIT SCHOOL DISTRICT NO. 2, MARSHALL COUNTY, ILLINOIS; COMMUNITY UNIT SCHOOL DISTRICT NO. 4, MARSHALL COUNTY, ILLINOIS, and C. W. SWANSON, County Superintendent of Schools of Marshall County, Illinois Plaintiffs-Appellees, vs. DELBERT SHIRLEY, ARTHUR GARBER, VERLE KOLB, FRANCIS KUHL, GERALD KNOBLAUCH, NORMAN ZOOK, HAROLD DIEBEL, and DALE MOORE, County Superintendent of Schools of Woodford County, Illinois Defendants-Appellants	Appeal from the Circuit Court of the Tenth Judicial Circuit of Illinois, Marshall County, General Division Honorable Albert Pucci, Judge Presiding.

STOUDER, J.

This is an appeal from an order of the Circuit Court of Marshall County enjoining Defendants from acting as a Board of Education of School District #21.

The facts which follow are not substantially in dispute. On May 14, 1962 a petition was filed with the County Superintendent of Schools of Woodford County for the calling of an election to form unit district No. 21. A hearing was set and held and on July 27, 1962 an order entered granting the prayer of the petition. An administrative appeal was taken from this order to the Circuit Court of Woodford County which court affirmed the order of the Superintendent on February 11, 1963. On March 28, 1963 an appeal was taken from

the order of the Circuit Court to the Appellate Court and on March 30, 1963 an election was held for the formation of the district. This election carried and Defendants were elected as members of the Board of Education of District 21 on May 25, 1963.

Prior to the filing of the petition above mentioned, the Board of School Trustees of Marshall County entered an order attaching much of the territory included in the petition to adjoining school districts. This order was affirmed by the Circuit Court of Marshall County and an appeal taken to the Appellate Court where the two cases were consolidated for hearing. School District v. Moore 46 Ill. App. 2d 14, 195 N. E. 2d 833.

While these appeals were pending Defendants organized as a Board of Education, reported to the County Superintendent of Schools of Woodford County, were accredited by the State Superintendent of Public Instruction, made tax levies, collected taxes, received State Aid, and operated schools, although Plaintiffs refused, despite Defendants' demands, to relinquish possession of the territory, buildings and equipment in the disputed area.

On January 23, 1964, the Appellate Court in School District v. Moore supra, affirmed the decisions of both lower courts and on June 8, 1964 Plaintiffs filed a petition in equity seeking to enjoin Defendants from acting as a Board of Education. The trial court entered an order granting the prayer of the petition and from this order Defendants appeal.

Appellants urge that Plaintiffs' proper remedy was a proceeding in quo warranto and that this remedy is exclusive, therefore the trial court was without jurisdiction to enjoin Defendants from acting as a Board of Education. Appellants further argue that the operation of a supersedeas as provided in the school code (I.R.S. ch. 122 sec. 11-6) terminated upon the decision of the Circuit Court on review of the order of the County Superintendent, and that no supersedeas attaches upon appeal to the Appellate Court without compliance with the provisions of the Civil Practice Act (I.R.S. ch. 110 sec. 82 (1)).

In addition to disputing the above contentions, Appellees argue that not only was the election held on March 30, 1963 contrary to statute and void, but that any attempt to now hold a valid election would violate the constitution since it would result in fracturing an existing district.

We are unable to understand Appellees' argument as to the proper remedy in this case. If there is any meaning it must be that since Appellees refused to deliver possession of the disputed territory to Appellants there was no assumption of authority and consequently no user and that quo warranto would not lie. However Appellees argue only that quo warranto is not the exclusive remedy. Furthermore Appellees argue that their refusal to deliver possession was predicated upon the belief that the election forming the district was invalid, that there was no district and consequently could be no Board of Education. Appellees do not deny that Appellants did act as a Board of Education and conducted schools in other territory within the alleged district. We think it apparent that Appellants' actions, including their demands for possession of the territory claimed by Appellees, constituted acting as a Board of Education and that Appellee is in reality attacking the legality of the formation of the district. That this must be done by a proceeding in quo warranto and that such is the exclusive remedy has long been settled in this state. Board of Education v. Tharp 336 Ill. 227, 168 N.E. 375; District 121 v. District 123, 309 Ill. 403, 141 N.E. 129; Schrodt v. Holsen 299 Ill. 247, 132 N.E. 424; People v. Firek, 5 Ill. 2d 317, 125 N.E. 2d 637. In District 121 v. District 123, supra the Supreme Court said "As we have seen, the real question involved in this case is as to the validity of these school organizations over the territory in question. A court of equity had no jurisdiction of the subject matter of such a question and the bill should have been dismissed." The Court in the same case also said "The fundamental question involved in the case is as to the power of these districts over the land in question. It has long been settled in this State that such a question can be reached only by quo warranto." Again in Schrodt v. Holsen, supra "Equity has no

jurisdiction to determine the regularity of the organization of this community high school district, nor has it jurisdiction to enjoin the collection of a tax levied by the authorities of the district, because that involves a collateral attack upon its corporate existence. The law provides an adequate remedy by quo warranto, and such remedy is exclusive." As recently as 1955 the Supreme Court has said "For it is still the doctrine of this court that attacks upon the proceedings by which a municipal corporation was formed, or by which territory was annexed to, or detached from it, cannot ordinarily be made in actions to collect taxes, or in suits in equity to enjoin such collection, but that such objections can only be raised by bringing an action of quo warranto." People v. Firek, supra. Clearly supporting this view are the cases of Romine v. Black, 304 Ill. App. 1 and Ziebell v. Village of Posen, 257 Ill. App. 32 which hold that the resort to a court of equity is proper to question the authority of powers or franchises exercised only when the remedy of quo warranto is unavailable.

Appellees have made no attempt to argue in what respect they do not fall squarely within these authorities but have instead cited a myriad of cases into which they do not fall. We are not unmindful of the authority of Village of Morgan Park v. City of Chicago 255 Ill. 190, 99 N.E. 388. We can not, however, see how this may be controlling in the instant case. In the Morgan Park case the court held that an injunction would lie to prevent the City of Chicago from assuming jurisdiction over the affairs of the Village even though the question of the legality of the annexation proceeding was indirectly attacked since such question was incidental to the court's jurisdiction in the protection of property rights. Our courts have repeatedly held that the people have no property rights in our schools and we fail to see how the protection of a non-existent right can be incidental to any other question.

We must hold that the instant action is in reality an attack upon the legality of the formation of district 21 and that this attack could be made only by a proceeding in quo warranto. The trial court was in error in failing to dismiss

the petition on Appellants' motion.

A decision that the action was not properly brought, should, under ordinary circumstances dispose of this case. However, the practicalities of the conditions of this litigation compel us to make an attempt to finally conclude it. This is the second time the case has been before this court involving the conflicting claims of these same districts to the same territory. Should we leave our decision as it now is, we will ultimately be faced with deciding the question of the legality of the election establishing district 21. We feel that the question is fully presented to us on the record in its present state and that the ends of justice will be better served if the decision is made now.

Chap. 122, Ill. Rev. Stat. 1961 commonly referred to as the School Code, in section 11-6 provides where pertinent as follows "The decision of the county superintendent shall be deemed an "administrative decision" as defined in Section 1 of the "Administrative Review Act" and any petitioner or resident who appears at the hearing may apply for a review of such decision in accordance with the "Administrative Review Act", and all amendments and modifications thereof and the rules adopted pursuant thereto. The commencement of any action for review shall operate as a supersedeas, and no election shall be held pending final disposition of such review."

Chap.t 110, Ill. Rev. Stat. 1961, Sect. 82 (1) provides in part "An appeal to the Appellate or Supreme Court operates as a supersedeas only if and when the appellant, after notice, gives and files a bond in a reasonable amount, to secure the adverse party. ...If notice of Appeal is filed within 20 days after the entry of the order, determination, decision, judgment or decree complained of, and if bond is given, filed and approved within 30 days after the entry, or within the 30 day period or any extensions thereof, the notice of appeal, upon the approval of the bond, operates as a supersedeas." Chap. 110, Ill. Rev. Stat. 1961, Sect. 277 provides "The provisions of the Civil Practice Act, including the provisions for appeal, ...shall apply to all proceedings hereunder, except as otherwise provided

in this Act." Chap .0, Il v. Sta , Sect. 1 provides "The provisions of this act apply ' Civi roceedi except ... proceedings in which the procedure is ' lated by eparat In all those proceedings the separate statutes trol to e exten hey regulate procedure, but this Act applic to matt of proc egulated by separate statutes."

From a read s of th sections to is apparent that the School Code is a special s tut gulating scho s. To the extent that it also regulates judici l r ure involved ining school matters, the Civil Practice Act does not . Both reas ority compel us to conclude that the School Code does te Appella o the extent that the legislature intend he rsedeas t ation upon the commencement of an action for vi s de d to terminate upon the decision of the App r Su ing the action of the Circuit Court. People v. ll Il 2d 33; Community Dist. #2 v. Moore, supra, Nor latin U #1 v. Wright, 20 Ill. App. 2d 266, 156 N.E. 2d hold se would render the words "final disposition" meaningless. W here that the order of the court below properly decided that the election of March 30 was held contrary to the supersedeas then in effect. Since the statute provides explicitly that no election shall be held pending final disposition on appeal, the election of March 30 was "no election" within the meaning of the act and hence void.

We are not however constrained to hold that no election may now be held as urged by Appellees. In the Moore case, the Appellate Court held that the order of the Marshall County Court was affirmed but that the order of the Woodford County Court was also affirmed. This means that the annexation provisions of the Marshall County order were subject to the election provisions of the Woodford County order ordering the election. Since the attachment of the disputed area under the Marshall County order is dependent on the outcome of the election no constitutional question of fragmentation is involved. The election has never been held and it is our opinion that it now should be.

Since we find that the Circuit Court of Marshall County improperly failed to dismiss the complaint for want of jurisdiction the order of said Court is reversed.

ORDER REVERSED.

Coryn, P.J. and
Alloy, J. concur

Filed 10-25-66

76 I.A.2 24

Case No. 65-81

In The

APPELLATE COURT OF ILLINOIS

Third District

Abstract

A.D. 1966

WILLIAM E. McCORMICK, Plaintiff-Appellant, vs. RUSSELL PIPER, Defendant-Appellee.	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois. Honorable Dan H. McNeal Judge Presiding.

STOUDER, J.

This action was commenced by Plaintiff, William E. McCormick in the Circuit Court of Rock Island County against Defendant, Russell Piper to recover damages resulting from an automobile collision. Plaintiff appeals from a judgment in his favor in the amount of $750.00 entered on the verdict of the jury. No questions arise from the pleadings.

On September 5, 1962 while Plaintiff was operating his automobile the automobile was struck in the rear by one operated by Defendant. At the trial the principle issues were the nature, extent and proximate cause of Plaintiff's injuries. In support of his claim that he had sustained serious injuries to his back and neck Plaintiff introduced the testimony of two physicians. As evidence of his special damages Plaintiff introduced medical bills totaling $611.03, Federal Income Tax returns from his business as a self- employed insurance adjuster and a bill in the amount of $177.50 for automobile repair.

Defendant claimed and endeavored to prove by the evidence, that the impact

between the cars was so slight that no injuries could have been caused thereby, that no injuries had been caused and that if the Plaintiff was suffering from a state of ill health it was occasioned by a previous accident occurring in 1954.

Plaintiff, in seeking to reverse the judgment of the trial court, argues first, that the verdict of the jury was the result of passion and prejudice since although the jury found Defendant liable its verdict did not compensate Plaintiff for his special damages, pain and suffering or permanent injury and second, that Plaintiff was deprived of a fair trial by the improper conduct of Defendant's counsel.

Plaintiff's principal assignment of error is that the verdict of the jury was against the manifest weight of the evidence in that its award was inadequate. Plaintiff relies on the cases of O'Brien v. Howe, 30 Ill. App. 2d 419, 174 N.E. 2d 905, Yep Hong v. Williams, 6 Ill. App. 2d 456, 128 N.E. 2d 655 and Daly v. Vinci, 51 Ill. App. 2d 372, 201 N.E. 2d 200 in support of his argument that the verdict of a jury should be set aside where the amount of the verdict indicates that the jury failed to consider undisputed evidence of damage. We agree with the principles of the aforementioned cases that particularly where liability is not an issue of the case, undisputed and uncontradicted evidence of damage cannot be ignored by the jury.

Plaintiff urges that it is undisputed and uncontradicted that he sustained serious permanent injuries resulting from the collision in 1962. An examination of the record does not support this contention. It is undisputed that Plaintiff was injured in a car accident in 1954 and that in a trial arising from such accident Plaintiff claimed permanent injuries and was awarded damages therefore. It is clear from the record that the nature, extent and cause of the injuries which might have resulted from the accident in 1962, as well as their relationship to injuries which might have resulted from the accident in 1954, are areas of substantial and significant dispute. Many opposing inferences may be drawn from the

testimony of the witnesses concerning Plaintiff's symptoms, treatment and from Plaintiff's own testimony. Under such circumstances we believe it is axiomatic that it is the proper function of the jury to determine such disputed questions. There is ample evidence in the record from which the jury might properly conclude that the state of ill health complained of by Plaintiff might have been in whole or in part the result of his 1954 accident, or that the resulting injuries from the 1962 accident were minimal. Consequently the jury's award of less than Plaintiff's out of pocket expense is not indicative of any failure on the part of the jury to consider all proper elements of damage. We do not find that the jury's verdict was against the manifest weight of the evidence. On the contrary, it is amply supported by the evidence and should not be disturbed.

We have considered other assignments of error urged by Plaintiff concerning misconduct of Defendant's attorney in cross examination and in final argument. However after examining the entire record we are of the opinion that no prejudicial error resulted from such alleged misconduct.

Finding no error in the judgment of the Circuit Court of Rock Island County the judgment is affirmed.

JUDGMENT AFFIRMED.

Coryn, P.J. and
Alloy, J. concur.

49867

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DAVID TAYLOR, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a conviction for the crime of indecent liberties, after waiver of a jury and a finding of guilty, with sentence in the Illinois State Penitentiary for a period of two to ten years.

On July 1, 1963, Mattie Franklin, a 9 year old girl, was taken to her mother, Ernestine Franklin, by Bertha Mosby, age 18 and Loretta Payne, age 17, neighbors of the Franklins. Mattie accused defendant, David Taylor, of having sexual relations with her and thereafter Mrs. Franklin notified the police. The complaining witness was examined at Cook County Hospital. On July 2, 1963, Officer Roland Howard arrested defendant in his television and candy shop, in the presence of Mattie and her mother. Defendant was identified by Mattie Franklin, Bertha Mosby and Loretta Payne.

At the trial, Bertha Mosby testified that she and a Loretta Payne had occasion to follow the complaining witness into defendant's shop on July 1, 1963 at about 7:30 P.M.; that when they entered the shop, defendant came from the rear room putting his shirt inside his pants and zipping up his zipper; and that upon being asked where Mattie was, defendant said, "She is not in here." She further testified that Mattie emerged from the back room to the front of the shop, that Mattie was crying and that Mattie told the two girls, in defendant's presence, that defendant had pulled her pants down and rubbed his "pena on her thing."

Loretta Payne testified that she and Bertha Mosby had occasion to go to defendant's shop on July 1, 1963 at 7:30 P.M.; that

defendant came from the rear of the shop with his pants unzipped; that she asked "where is Mattie" and defendant replied, "Mattie is not here"; that looking in the back room of the shop, she saw Mattie and said, "there she is"; and that Mattie came out crying and in the presence of Bertha Mosby, defendant and the witness herself, Mattie said, "he took down my panties, put me on the bed and stuck his private in me" and "he told me if I kiss his private, if I wouldn't he will kill me." Defendant denied this testimony.

Officer Roland Howard testified that when he arrested defendant in his shop on July 2, 1963, in the presence of Mattie and her mother, Mattie identified defendant and that later the same day, defendant was identified by Bertha Mosby and Loretta Payne in his presence.

Mattie's mother, Mrs. Franklin, testified that her daughter made a complaint to her about defendant's actions toward her on July 1, 1963.

David Taylor, defendant, taking the stand denied the charges. He testified that he had never seen Mattie before the date of his arrest; that Bertha Mosby and Loretta Payne had worked for him; that he had fired them for stealing records; that their testimony constituted a frame-up; and that they had made threats in anger because of being fired.

Bertha Mosby testified, in rebuttal, that she had never worked for defendant and that she had never stolen any records from his store and had never been so accused.

Loretta Payne testified, in rebuttal, that she had worked for defendant for one day, was never paid, and that he had said, "if you will go to bed with me, I will pay you"; that she ran out of the store and had not returned until this incident of July 1, 1963; that she had never stolen any records from the shop; and that she had nothing against defendant.

Defendant was found guilty of the charge of indecent liberties and was sentenced to a minimum of 2 years and a maximum of 10 years in the Illinois State Penitentiary, after a hearing on aggravation and mitigation.

Defendant contends that he was convicted on the uncorroborated testimony of the complaining witness and that the evidence is insufficient to support the conviction. We disagree with defendant.

Citing People v. Nunes, 30 Ill.2d 143, 195 N.E.2d 706 (1964), defendant contends that the evidence was insufficient to sustain a conviction and that the testimony of the complaining witness was not corroborated. However, in Nunes, the alleged acts took place at a busy taxicab office, in which defendant sat at a desk in front of a large window. Further, the complaining witness' testimony was contradicted by her girl friend, she did not complain to her mother until a week or two after the incident and the testimony as to the date of the occurrence was inaccurate. Furthermore, in the Nunes case, the complaining witness worked as a baby sitter in the home of the defendant after the defendant was indicted. The court stated at page 147:

> . . . The combination of all of these circumstances is sufficient to create a reasonable doubt as to whether the defendant was guilty of the crime alleged in the indictment. It cannot be said in the face of the contradictions and the improbabilities in the testimony of the two girls that the evidence creates an abiding conviction of the defendant's guilt.

In the instant case, the acts of indecent liberties were alleged to have taken place in the back of the shop and that complaining witness made prompt complaint to Bertha Mosby and Loretta Payne, in defendant's presence, and made immediate complaint to her mother, who in turn notified the police on the same day. Further, defendant was identified by the victim at the time of his arrest and at the trial. Her testimony was clear, consistent and unshaken on cross-examination and there is nothing in her testimony, which tends to discredit her

story. It would be unreasonable to assume that the 9 year old girl could detail the facts and surroundings so that they could be substantiated by witnesses, if her story were not true.

The testimony of complaining witness was corroborated by Bertha Mosby, who testified that she saw defendant come from the back room of the shop, putting his shirt in his pants and zipping his pants up and that she was present when the victim came out of the back room crying. Further corroboration came from the testimony of Loretta Payne, who testified that defendant came from the room in back of the store with his pants unzipped, to be followed a short time later by the complaining witness, who came out crying and threw the money underneath the couch.

Defendant argues that complaining witness on cross-examination testified that he had not molested her on other occasions, while on re-direct examination, she testified that defendant had molested her on other occasions. This they conclude was a confused nine year old girl, whose testimony was not clear and convincing. We do not so read the record. On cross-examination, she was asked the following questions and she gave the following answers:

Q. And occasionally you would clean up there too, wouldn't you? Wouldn't you clean some things around there?

A. Yes. When I was working.

Q. Yes. He never touched you, did he, then?

A. No sir.

Q. You have been there many times, right, with other children?

A. Yes sir.

Q. Right?

A. Yes sir.

Q. And he never touched you, did he?

A. No. When I went in there to buy candy myself.

On re-direct examination, the complaining witness further testified:

Q. Mattie, is it true that the reason you didn't know the exact day it was is because this had happened more than once?

A. Yes sir.

Q. So therefore you didn't know which day it was, did you?

A. No sir.

Q. All right. Now, when you talked to the two girls and you told them what happened are you sure you used the word private to them?

A. Yes sir.

Q. You used that word. Had you ever heard the word before?

A. No sir.

Q. The first time you had ever used--you first learned of this word from your mother, is that correct?

A. Yes sir.

Mr. Gerber: Object, this is outside the scope of the cross.

Mr. Larrey: Counsel just brought this in. I am trying--

Mr. Gerber: You are going a little beyond my--

Mr. Larrey: All I want to find out if she ever heard this word private from her mother other than that particular time. That is all I was trying to find out. That was my last question.

The Court: All right. This time you are talking about was the time Mosby and Loretta Payne came in, that is the day you are talking about here?

The Witness: A. Yes sir.

The Court: You said this happened to you by this man on other occasions?

The Witness: A. No sir.

Mr. Larrey: Q. Other times at different times other than that one time?

The Witness: A. No sir.

The Court: We are talking about this one time these two girls came in. You don't remember that as July 1st or not, but if that is the day they came in, then that is the date as far as you are concerned. Is that what you mean?

The Witness: A. Yes.

The Court: All right. Call your next witness.

From the above we deduce that the record is clear; that the testimony of the complaining witness cannot be construed as accusing defendant of having molested her on prior occasions.

Defendant contends that Bertha Mosby and Loretta Payne tried to "frame" him because he fired them for stealing records. Bertha Mosby testified that she never worked for defendant and never stole any records from him and that her suspicions of defendant were aroused because the complainant's playmates told her that complainant was going to defendant's shop. Loretta Payne in her testimony stated that she worked for defendant one day; that defendant did not pay her and that he said, "if you will go to bed with me I will pay you." She further testified that she had never stolen any records and that she had nothing against defendant.

Defendant's next contention is that the testimony of the mother of the complaining witness indicates that the two teenage witnesses told her that they saw the acts of molestation, whereas, the testimony of the two teenagers shows that they did not. On cross-examination the following questions were asked of Mrs. Ernestine Franklin, by defense counsel:

Q. Did they watch the performance that we are now being charged with?

A. They told me they saw her when she went in there.

Q. I ask you now whether they went in with her?

A. They went in behind her.

Q. Behind and with her, is that correct?

A. Yes.

Q. Did they watch her perform? Do you understand what I am talking about?

A. Yes.

Q. Did they?

A. Yes.

Q. They saw it?

A. Yes.

We feel that the mother was confused by the use of the word "performance." The girls could have been talking about the events subsequent to the actual act of molestation; e.g., Mattie being in the back room, her entry from the back room, etc.

Defendant next contends that the negative report from the hospital constitutes a lack of corroboration. We believe this contention is without merit. People v. Gilmore, 320 Ill. 233, 150 N.E. 631 (1926) and People v. Johnson, 298 Ill. 52, 131 N.E. 149 (1921) indicate that neither contact with a sex partner nor actual physical injury to the child is essential to support a charge under the statute. In both of those cases there was a passing of hands over the body of a female child, under the dress but outside the underclothing, under circumstances which made manifest the intent of the offenders. In this case, defendant pulled down his clothes and the clothes of the victim, put her on the bed, got on top of her and rubbed his private on her. These acts of defendant constitute conduct sufficient to establish and sustain the charge under the statute of indecent liberties.

Finally, defendant contends that lack of complaint as to the torn or ripped pants raises a doubt as to defendant's guilt. We disagree. The victim made timely and immediate complaint as to the acts of indecent liberties by defendant to Bertha Mosby, Loretta Payne, Ernestine Franklin, her mother, , and identified defendant at the time of his arrest in the presence of Officer Howard.

We are familiar with the case of People v. Mueller, 2 Ill.2d 311, 118 N.E.2d 1 (1954), where the court said:

> The Court is aware that the charge of taking indecent liberties is easily made, hard to be proved, and harder to be defended by the party accused, though ever so innocent. We have therefore required that where an accused denies the charge, the testimony of the prosecuting witness, being a child of tender years, must be substantially corroborated by some other evidence, fact or circumstance, or be clear and convincing. (People v. Williams, 414 Ill. 414).

We feel, however, the judgment should be affirmed and it is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and BURKE, J., concur.

50306

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRUCE THURMAN, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY CRIMINAL DIVISION

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the Circuit Court of Cook County sentencing the appellant to a term of not less than 70 nor more than 80 years in the Illinois State Penitentiary for the crime of murder committed during the course of a robbery.

The facts of this case are as follows: On July 18, 1964, Clayton L. Schoenstedt was shot and killed at 82nd and Cottage Grove, in Chicago, Illinois, during an attempted robbery of the bakery truck which the deceased was driving. At the trial a number of witnesses testified that they saw the appellant either running away from the scene or at a point in the vicinity of the murder a short time thereafter. Mr. Gene T. Williams testified that he saw the appellant run past him with a weapon in his hand and get into an automobile. Appellant was wearing a raincoat like the one which the State had on exhibit at the trial, which raincoat was discovered in the accomplice's room at 9407 S. St. Lawrence. Shortly afterward the appellant was seen at 95th and Woodlawn by four young men, Steve Tonkovich, Bobby Parks, Phil Janisch and Thad Wisniowski. Steve Tonkovich drove the appellant and Chauncey Beasley to 94th and St. Lawrence. Appellant was arrested at 2:30 in the afternoon of July 18th by several police officers including William McHugh and Stuart Bradshaw. At this time the appellant made an admission, which he denied on trial, to the effect, "Don't shoot me, I did it." Before the arrest, the accomplice Beasley told Officer Bradshaw that he would take him to the address where both appellant and Beasley had kitchenettes. The police and Beasley went to his room where he showed the police a raincoat that he

said the appellant was wearing at the time of the offense, and which was subsequently identified by witnesses at the trial. The court made a finding of fact that the coat was taken from Beasley's room with his consent.

The central issue on this appeal revolves around the seizure of the raincoat of the appellant, which was later introduced into evidence against the appellant. The contention of the appellant is that the search of the room where appellant resided was unreasonable because the search was not incident to and at the site of the arrest. The appellant argues that this search took place after his arrest. The record does not bear out this contention. The police officer who made the search of the rooms at 9407 S. St. Lawrence clearly testified that the search was made in an effort to apprehend the appellant who was still at large. This officer testified that Chauncey Beasley, the accomplice of the appellant, took the police to his apartment to try and find the appellant. And while in Beasley's apartment, at Beasley's invitation, the police found the raincoat that belonged to the appellant.

Appellant's argument rests on two questions of fact: had the appellant been arrested at the time of the seizure of the raincoat, and was the search and seizure of the coat made in the room of Chauncey Beasley, where the police were invited, or was it made in the room of the appellant, who gave the police no permission to search his room? The trial court ruled on both of these issues against the appellant and in favor of the prosecution. The determination of an issue of fact such as this is clearly one for the discretion of the trial court. Neither the argument of counsel for defendant on appeal nor the record of the trial discloses any reason for finding that the trial court abused the discretion of the court in finding against the appellant on the evidence.

For this reason we do not reach the issue of whether this was a valid search and seizure. The cases which appellant cites on behalf of the proposition that this was an unreasonable search and seizure are situations where the search was made subsequent to the arrest, which are not applicable because of our finding that the trial court did not err in its rulings on the evidence.

Appellant also raises the issue that he was sentenced without a hearing on aggravation and mitigation. Section 1-7 (g) of the Illinois Criminal Code (Ill. Rev. Stat. 1965, c38, par.1-7) states:

> "For the purpose of determining sentence to be imposed, the court shall, after conviction, consider the evidence, if any, received upon the trial and shall also hear and receive evidence, if any, as to the moral character, life, family, occupation and criminal record of the offender and may consider such evidence in aggravation or mitigation of the offense."

The court has consistently interpreted this statute to mean that it was mandatory for the court to hear evidence as to aggravation and mitigation of the offense if such a request was made by the State or appellant, but not otherwise, People v. Pennington, 267 Ill. 45, 107 N.E. 871; People v. Throop, 359 Ill. 354, 194 N.E. 553; People v. Wakeland, 15 Ill.2d 265, 154 N.E.2d 245. This interpretation of the statute places the burden for the hearing where it properly belongs: upon the party who has evidence to present. People v. Smith, 62 Ill. App.2d 73, 210 N.E.2d 574. Since the appellant in this case failed to request a hearing he is deemed to have waived his rights under the statute.

For the above reasons the judgment is affirmed.

AFFIRMED.

LYONS, J., and BURKE, J., concur.

50897

PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. CHARLES THOMAS, otherwise called Thomas Charles, Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY CRIMINAL DIVISION

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This case represents an appeal from the Circuit Court of Cook County, convicting appellant of unlawful possession of marijuana and sentencing him to the Illinois State Penitentiary for a period of from five to seven years.

On August 21, 1962, an anonymous police informant told Chicago Police officers Thomas Simpson and Andrew Craig that within the last hour, he had purchased heroin from the appellant at 3419 Fulton Street, Chicago, Illinois, where the appellant has his home. The officers testified that they had used the informant on other occasions and had found him to be reliable. One of the appellant's daughters answered the door. The policemen announced their office, and the young girl began yelling "Daddy, daddy, the police." She ran to the front of the house and started to climb the stairs. Officer Simpson followed her and saw her attempt to flush a brown package down the toilet. Officer Simpson seized this package and found it contained a silver foil packet containing an unknown crushed green plant and another package which contained marijuana. After a while, the appellant was brought up from the basement where he was visiting the apartment of his son and daughter-in-law and the appellant admitted to the police at that time that the narcotics belonged to him. Appellant later denied having made this admission.

The decisive issue on this appeal is whether the search and seizure of the marijuana from defendant's home without a warrant was based on a reasonable cause for the arrest of the appellant. It is

the contention of the appellant that he had a right to be free from an unlawful search and seizure and that the trial court committed error by refusing to allow his petition to suppress the evidence and by refusing to allow the evidence at the trial, because an arrest based solely upon information given by an anonymous informant whose name was not disclosed at the trial is an illegal arrest.

This case presents in clear focus one aspect of the recurrent conflict between the interest of the public in the suppression of the narcotics traffic on one hand, and on the other, the constitutionally guaranteed security of the individual against unreasonable search and seizures. Is an arrest reasonable when it is based on information from one anonymous informer upon whom the police have relied on in the past, and who has provided information sufficient to obtain a conviction? The Illinois Supreme Court has said that, it is well settled in this State that arresting officers may have reasonable grounds for believing a defendant was committing a crime based upon information supplied by an informant if the reliability of the informant has been previously established or independently corroborated. People v. McFadden, 32 Ill.2d 101, 203 N.E.2d 888; People v. LaBostrie, 14 Ill.2d 617, 153 N.E.2d 570; People v. Tillman, 1 Ill.2d 525, 116 N.E.2d 344. This statement of the law was affirmed in People v. McCray, 33 Ill.2d 66, 210 N.E.2d 161, where the Court added the necessity that the State must show the basis of the arresting officers' belief, including facts relating to the credibility of the informant. We hold that the State in this case sustained the burden of showing the informant relied upon by the police was a reliable source of information and hence the arrest of appellant was valid. The police testified that he had been used in other narcotics arrests, and that he recently had furnished information which led to the arrest and conviction of one Eugene Paradise.

Appellant's contention that the State failed to prove beyond a reasonable doubt that appellant was guilty of unlawful possession of narcotics is of no avail. Appellant admitted and then later denied that the narcotics which were taken from his daughter belonged to him. Unlawful possession of narcotics may be actual or constructive. People v. Fox, 24 Ill.2d 581, 182 N.E.2d 692; People v. Holt, 28 Ill.2d 30, 797 N.E.2d 811; People v. Mack, 12 Ill.2d 151, 145 N.E.2d 609. Defendant's admission of ownership was sufficient to constitute constructive ownership. People v. Fox, supra. And the fact that he later denied having made the incriminating admission is one for the discretion of the trial court which we will not disturb absent some clear showing of abuse.

For the above reasons the judgment is affirmed.

AFFIRMED.

LYONS, J., and BURKE, J., concur.

76 I.A. 2 42 (2)

51140

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GEORGE CARVIN, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the Circuit Court of Cook County finding appellant guilty of robbery and sentencing him to the Illinois Reformatory for a period of from 15 to 20 years.

On March 20, 1961, Pauline Thornton entered the shoe repair shop at 1515 East 67th Street, Chicago, Illinois, which was operated by Sam Polley. She asked the owner the cost of repairing some shoe heels. The appellant then entered the store and pointed a gun at Mr. Polley. Appellant instructed the Thornton woman to cover Mr. Polley's face. Appellant then pushed Mr. Polley to the back of the store, at which time Mrs. Polley began to scream. These screams were heard by Osborn Jackson who was sitting at the window of the tavern he operated at 1517 East 67th Street, Chicago, Illinois, from which he had seen the appellant drive up and park across the street. Mr. Polley removed the hood from his head. The appellant then kicked Mrs. Polley and took $5.00 from one Ida Franklin who was in the shop at the time. The appellant ran out the back of the store and Mr. Polley ran toward the front of the store. Osborn Jackson saw the appellant run out the back of the store as he was arriving at the front of Mr. Polley's shoe shop.

When Officer Charles Warren arrived at the scene of the robbery he questioned the parties there, including Pauline Thornton. She stated that she was a victim of the robbery and was released.

Four days after the crime appellant was identified in a police line-up by both Osborn Jackson and by Mr. Polley.

Appellant raises three issues on appeal. He contends that

the identity of the appellant was not proven beyond a reasonable doubt; that the prosecution made remarks to the jury which were improper and highly prejudicial; and that it was erroneous and prejudicial for the State's Attorney to refer to the fact that appellant did not call Pauline Thornton as a witness.

The identification of the appellant was sufficient to warrant his conviction in this case. Osborn Jackson had ample opportunity to observe the appellant as he parked his car across the street from Mr. Jackson's tavern at 1517 East 67th Street and walked across the street towards him. He also was able to observe the appellant through the window of Mr. Polley's shoe shop as the appellant ran out the back door. Mr. Jackson also picked the appellant out of a line-up.

Appellant was also identified by Mr. Polley. Contrary to appellant's contention Mr. Polley also had ample opportunity to observe the appellant when he entered the shoe repair shop and after he had pulled the hood off his head. The identification by Mr. Polley was likewise positive.

Appellant's counsel noted a claimed discrepancy concerning the weight of the appellant, who testified that he weighed 158 pounds. Witnesses testified that the appellant weighed anywhere from 175 to 220 pounds. These alleged discrepancies were brought before the jury which resolved the inconsistency. In view of the positive identifications by two witnesses this minor inconsistency is not sufficient to cast any real doubt that the appellant was the man who committed the robbery in the shoe repair shop.

The law is clear that the sufficiency of an identification is for the trier of facts who was in a position to see and hear the witnesses and who was in a position to determine the weight to be given their testimony. People v. Thompson, 406 Ill. 555, 94 N.E.2d 349. The law is also clear that the positive identification of even

one witness where that witness is credible is sufficient to convict. People v. Wilson, 1 Ill.2d 178, 115 N.E.2d 250.

Appellant's next contention is that the prosecution made remarks to the jury which were improper and prejudicial. The action of the State's Attorney which appellant claims was prejudicial was the choice of words that the State's Attorney used to describe the appellant and his actions towards Mrs. Franklin. The State's Attorney advised the jury they were dealing with a convicted felon who "kicked a lady," and characterized the treatment by finally stating "God knows how she lived." While this Court will not condone intemperate and prejudicial language on the part of counsel, the language used by the State's Attorney in this case falls far short of affording a cause for reversal. There was only one brief episode involved here, and the statements made by the State's Attorney were based on the evidence. It is not improper to reflect unfavorably on the appellant or to denounce his wickedness and even indulge in invective if based upon evidence competent and pertinent to be decided by the jury. People v. Gleitsman, 384 Ill. 303, 51 N.E.2d 261; Crocker v. People, 213 Ill. 287, 72 N.E. 743; People v. Rooney, 355 Ill. 613, 190 N.E. 85; People v. Heywood, 321 Ill. 380, 152 N.E. 215.

The last issue which appellant raises on this appeal is that it was erroneous and prejudicial for the State's Attorney to refer to the fact that appellant did not call Pauline Thornton as a witness. The People were not wrong in bringing up the absence of Pauline Thornton in their closing argument. Appellant's counsel emphasized the fact that the prosecution failed to account for the absence of Pauline Thornton and related efforts of the defense to locate the missing party. The prosecution's reply which noted that neither the defense nor the prosecution had been able to find Pauline Thornton was proper. The prosecution had a right to reply and to state the reasons why the

People could not produce the witness. People v. Wheeler, 5 Ill.2d 474, 126 N.E.2d 228.

For the above reasons the judgment is affirmed.

AFFIRMED.

LYONS, J., and BURKE, J., concur.

No. 66-51

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

BAUER DISTRIBUTING CO., INC., Plaintiff-Appellant, -vs- VESCI FALSTAFF BEER DISTRIBUTORS, INC., Defendant-Appellee.	)	Appeal from the Circuit Court of Marion County, Illinois

George J. Moran, J.

Plaintiff appeals from a judgment in his favor in the sum of $52,832.28, claiming that the court erred in not entering judgment for his full claim of $54,606.20.

Bauer Distributing Co., an Illinois corporation, and Bauer Rental Services, a Delaware Corporation, had been in business in Centralia and in DuQuoin for a number of years prior to August 1, 1964. Frederick F. Bauer has been the chief stockholder, president, and general manager of both corporations since their organization. Vesci Falstaff Beer Distributors was chartered as a corporation in Illinois. Anthony Vesci has been its president since its organization.

Bauer Distributing Co. was engaged solely in the purchase, storage, sale, and distribution of Falstaff beer in five Illinois counties. The evidence indicates that its assets consisted of two bank accounts, securities and investments, a 1906 Cadillac automobile used for public relations purposes, an inventory of beer, supplies for merchandising, advertising, and repairing, and certain tools like hand trucks and picnic tanks. Mr. Bauer also testified that Bauer Distributing Co. had purchased steel frames which were later encased in wood and used in the business.

Bauer Rental Services was engaged in the purchase and rental of real and personal property, which it then leased to Bauer Distributing Co. Its assets con-

sisted of real estate in Centralia and in DuQuoin, Illinois. The real estate in Centralia was improved with an office building and a warehouse; the real estate in DuQuoin was improved with a smaller warehouse. It also owned office and hospitality room equipment in the Centralia building, warehouse equipment, a tractor, two trailers, six route trucks, one picnic trailer, three automobiles, three fork lift trucks, a model T pick up truck, tools for each truck, tires, and securities and investments. There were also two rentable apartments in the Centralia building. In addition, Bauer Rental Services had purchased and placed a washer and a dryer in the building for the use of the tenants.

On July 1, 1964, Frederick Bauer was informed that Vesci was the new franchised Falstaff distributor in four of the five counties serviced by the plaintiff, Bauer Distributing Company. Mr. Vesci indicated at that time that he was interested in buying all property used in the beer distribution business in Centralia. Mr. Vesci testified that he had indicated to Mr. Bauer that he wanted to buy everything in connection with the business. During their meeting in Centralia, Mr. Bauer took Mr. Vesci and his son through the Centralia warehouse and showed them the facilities. Both Mr. Vesci and his son testified that Mr. Bauer had emphasized that he had a very completely equipped and furnished warehouse, ready to do business, and that he had pointed out two rentable apartments in the building, a washer and a dryer for the use of the tenants, a room with wooden shelving, and a service area. Mr. Vesci testified that while he was in the service area, he saw five new recapped tires and about six recappable tires. Mr. Bauer testified that he did not specifically point out the tires, the washer, or the dryer.

On July 10, 1964, Mr. Vesci and Mr. Bauer entered into a contract which provided in part that:

> In consideration of the mutual promises hereinafter set forth, Bauer Rental Services, Inc., hereinafter called Bauer, and Vesci Falstaff Beer Distributors, Inc., hereinafter called Vesci, agree as follows:
>
> 1. Bauer will deliver to The City National Bank of Centralia, Centralia, Illinois, the following:

(c) Bill of sale executed by Bauer as seller to Vesci as buyer for good and exclusive title to all physical personal property owned by Bauer and used by it and Bauer Distributing Co., up to and including July 31, 1964, in the Falstaff distributorship owned by Bauer Distributing Co., excluding therefrom the beer and other supplies for re-sale, books, records, small hand tools such as wrenches and any personal property not owned by either Bauer Rental Services, Inc., or Bauer Distributing Co.

4. Vesci and Bauer will take inventory on August 1, 1964, and Vesci will purchase from Bauer all beer on hand on August 1, 1964, and all other re-sale items at Bauer's cost. (Emphasis supplied.)

The contract also provided for the transfer of the Centralia real estate. The total contract price, excluding the inventory of beer and the re-sale items, was $110,000.00. This amount has already been paid by the defendant. The present controversy essentially concerns (1) the price to be paid for certain items described as "re-sale items" in paragraph 4 of the contract and (2) a dispute as to whether certain other items should have been delivered to the defendant under paragraph 1(c) of the contract.

On August 1, 1964, the inventory of beer was delivered to the defendant. A report was made to the Illinois Department of Revenue showing the amount sold. A report was also made by the defendant showing the amount of beer purchased. In the latter part of August, one of the drivers for the defendant loaded five pallets of beer onto his truck. On the next morning, he found that one case in one of the pallets contained empty bottles. He removed the whole pallet of 42 cases and replaced it, taking for granted that it contained empties. The driver testified that the pallet was one of those received from the plaintiff; that, after its delivery on August 1, it had not been moved from where it had originally been stacked; and that it was unlikely that anyone had tampered with the beer.

Mr. Bauer and the defendant's manager took inventory on August 1, according to the contract. At that time, the shelving that had been in the service area, the washer, the dryer, the five recapped tires, the recappable tires, and the picnic tubs had been removed. Mr. Bauer also began to take some of the advertising materials and coil boxes used for drawing picnic beer. The evidence indicates that Mr. Vesci became angry and told Mr. Bauer to return everything that he had removed;

that Mr. Bauer returned the beer tubs and attempted unsuccessfully to recover the tires which had been sold, and that Mr. Bauer had apologized and said "that his wife had told him he had done wrong" and that "he shouldn't have done it." Mr. Vesci also testified that he would not pay until everything had been returned.

Mr. Vesci testified that "the only thing I know about Bauer Distributing Co., Inc., was, in the contract, all assets or whatever was owned by Bauer Rental Services or Bauer Distributing Co., was to be part of this deal for $110,000.00"; that "I was doing business with him (Bauer) for the whole package"; and that "I didn't differentiate Bauer Rental Services or Bauer Distributing or Frederick Bauer, I thought I was talking to one person." There was evidence that Mr. Vesci knew that Bauer Distributing Co. and Bauer Rental Services were two separately chartered corporations.

Bauer Distributing Company brought suit against Vesci Falstaff Beer Distributors for the beer and personal property delivered to the defendant. The first amended complaint alleged that the plaintiff orally agreed to sell and the defendant orally agreed to buy the beer inventory ($53,199.53) and other goods and merchandise owned by the plaintiff ($1,406.67). The second amended complaint added a second count alleging that, in the alternative, the defendant was liable in quantum meruit for the fair, reasonable, and actual value of the goods delivered.

The defendant, in its answer, denied that it orally agreed to buy goods from the plaintiff and claimed that it was liable only to Bauer Rental Services for some of the goods delivered, since it had entered into a written contract concerning these goods. The answer also alleged that there was a shortage of forty-two cases of beer; that the defendant was only obligated under its contract to pay for resale items delivered to it; that the nonre-sale items delivered were included within the $110,000.00 contract price; and that certain items, amounting to $746.00, had not been delivered, even though they were to have been delivered under the contract terms. The answer then alleged a total set off of $1,904.82:

Shortage of beer inventory	$ 86.10
Overcharge for nonre-sale items	1,072.72
Nondelivered goods (washer, dryer, tires, shelving, tools)	746.00
Total Set Off	$ 1,094.82

The trial court wrote an opinion, finding that:

> The evidence does sustain defendant's contention that there was a shortage of 42 cases of beer. The conduct of Mr. Bauer with reference to the ten beer tanks, which he recovered and subsequently returned, is not consistent with his contention that they were not sold (under the terms of the contract). Again, when interrogated about the missing truck tires, he phoned the party to whom he had sold them and requested their return, but they had been disposed of and his request could not be and was not complied with. His removal of the washer, dryer, shelving, bench, and cabinets was also inexcusable, or at least had not been satisfactorily explained.
>
> The agreement of the parties provided that an inventory was to be taken on August 1, 1964, and that "Vesci will purchase from Bauer all beer on hand on August 1, 1964, and all other resale items at Bauer's cost." The evidence is far from satisfactory, but indicates that the value of the resale items does not exceed $384.95.
>
> Defendant, however, is entitled to offset the value of the following items, viz:

Shortage of beer	$ 86.10
6 recappable tires	66.00
5 recapped tires	200.00
Washer and dryer	150.00
Shelving and cabinets	250.00
Total	$ 752.10

> A judgment therefore, will be rendered in favor of the plaintiff and against the defendant for $52,832.38.

In arriving at the amount due plaintiff, the court allowed defendant the sum of $53,199.53 for the beer inventory, plus $384.95 for certain retail items, and allowed defendant a set off of $752.10.

The plaintiff argues that it did not agree to sell any of its property to the defendant, but that it delivered to the defendant the beer, empty bottles, cases, kegs, and all supply and resale items which it owned; that the property was accepted by the defendant; and that the defendant is obligated to pay the reasonable, fair, and actual value of the property. It argues that none of the property which it delivered was included within the original contract entered into by Bauer Rental

Services and the defendant; that there was proof that only one case of beer delivered was empty; that the shelving and cabinets were the personal property of Frederick Bauer and should not have been included as a set off; and, finally, that the washer, the dryer, and the tires were the property of Bauer Rental Services and should not be allowed as a set off against Bauer Distributing Company.

The law is established in Illinois that, "where language has been used in a contract that is ambiguous, previous and contemporary transactions and facts may be taken into consideration to ascertain the true meaning of the contract and the sense in which the parties used the particular terms." Olson v. Rossetter, 399 Ill 232; Continental Nat. Bank v. Art Insitute, 409 Ill 481. Under such circumstances, it is proper and necessary to look at the evidence pertaining to the respective positions of the parties, the purpose sought to be accomplished, and all of the facts and circumstances surrounding the execution of the contract in order to ascertain the real meaning and intention of the parties. Knowles Foundry and Machine Co. v. Nat. Plate Glass Co., 301 Ill App 128; Trompeter Const. Co. v. Higby, 22 Ill App 2d 420.

The trial court determined from all the evidence that the intention of the parties, as indicated by their conduct, was that the defendant was dealing with Frederick Bauer for the property used in the beer distribution business in Centralia, whether owned by Bauer Rental Services or by the plaintiff. There is ample support for this finding in the evidence. "(T)he courts will not permit themselves to be blinded nor deceived by mere forms of law, but, regardless of the fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." Chicago-Crawford Currency Exchange v. Thillens, 48 Ill App 2d 366; Caspers v. Chicago Real Estate Board, 58 Ill App 2d 113. The testimony of Mrs. Vesci indicates that he was interested in all property used in the business and that, even though he was aware that Bauer Rental Services and the plaintiff were two separately chartered corporations, he was dealing with Frederick Bauer "for the whole package." The contract itself

indicates that the activities of the two corporations were closely associated. The term "Bauer" was defined to refer to Bauer Rental Services. However, in paragraph 4, it was provided that Vesci would purchase all beer on hand and other resale items from "Bauer" at "Bauer's" cost (beer and supplies which were owned by Bauer Distributing Company). According to paragraph 1(c), "Bauer" was to give Vesci title to all physical personal property owned by "Bauer," excluding therefrom beer and resale supplies. This clause implies that "Bauer" refers to both corporations; for, if it only referred to Bauer Rental Services, there would have been no need to exclude beer and resale supplies, since Bauer Rental Services did not own those items. This clause also implies that all resale items were included within the transfer. Finally, the conduct of Mr. Bauer in returning the picnic tubs, admittedly owned by the plaintiff, and in attempting to return the tires also indicates the intention of the parties to transfer that property which the trial court found was intended to be covered by the sale.

"The effect of the finding of the trial court in law and chancery cases where the court hears evidence without a jury is substantially the same." Chicago Title & Trust Company v. Guild, 329 Ill App 374, at 382. Therefore, the findings of fact and conclusions of the trial court will not be disturbed on review unless manifestly against the weight of the evidence. Brown v. Zimmerman, 18 Ill 2d 94. In the present case, the findings of the trial court concerning the relationship and the intention of the parties are supported by the evidence and will not be disturbed.

For the foregoing reasons the judgment of the Circuit Court of Marion County is affirmed.

Judgement Affirmed.

CONCUR:

Honorable Joseph H. Goldenhersh

Honorable Edward C. Eberspacher

PUBLISH ABSTRACT ONLY.

No. 66-3

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FARMERS PELLET CO., a corporation, Plaintiff-Appellee, -vs- NORMAN HULCHER, Defendant-Appellant.	)	Appeal from the Circuit Court of the County of Montgomery, Illinois

George J. Moran, J.

This is an action in debt wherein the plaintiff-appellee, Farmers Pellet Co., sued for the balance due on an account for feed sold and delivered to the defendant-appellant, Norman Hulcher, and the defendant counterclaimed for an alleged overpayment.

The plaintiff alleged that, pursuant to an oral contract, it was to sell and deliver cattle feed to the defendant's place of business between October, 1963, and February, 1964, at a price not to exceed $57.50 per ton. The plaintiff offered evidence that the total price of the feed delivered and accepted was $15,711.95, and that the defendant had paid $12,229.86, leaving due the balance of $3,482.09 for which suit was brought. The defendant, on the other hand, alleged that there was an oral contract whereby the plaintiff agreed to furnish him with feed which would cost him between nineteen and twenty-one cents per pound of gain per steer, denying that the feed was to be paid for at a price per ton. The defendant counterclaimed for $3,724.88. This amount represented the difference between the cost of the feed determined on the basis of nineteen cents per pound of gain per steer and the cost per ton of feed delivered and paid for. Both parties offered evidence to sustain their allegations, much of which was directly contradictory.

The court, sitting without a jury, found for the plaintiff on its claim against the defendant, and against the defendant on his counterclaim, stating its findings in a written opinion, excerpts of which follow:

> The Defendant purchased all the feed for said cattle from Plaintiff for $15,589.65, and paid $12,107.56 of said amount.
>
> Plaintiff's manager, Donald McMurdo, testified that on October 13, 1963, he guaranteed to Defendant that the pellet feed wouldn't cost over $57.50 per ton delivered--that there was no discussion of 21¢ or 19¢ per pound of gain.
>
> The witness, Edwin Boston, who was present during most of this conversation, testified that Defendant did not say "If you can feed for 21¢ or less, you can go ahead."
>
> The witness, Eldon Fuchs, testified that at a Board of Directors of Plaintiff Corporation in March of 1965, Defendant stated that the price per pound of gain was not guaranteed on October 13, 1963.
>
> The witness, Boston, who was also present at the Board Meeting, testified that Defendant said he did not have a guaranteed price of 21¢ per pound of gain.
>
> The Defendant testified that at a meeting of October 13, 1963, with McMurdo, that the latter said he would furnish the feed at 21¢ per pound of gain or less.
>
> The evidence is clear that all the feed was delivered and the price charged for same is not claimed to be unreasonable.
>
> The Court finds the weight of the evidence is in favor of the Plaintiff and against the Defendant on the Complaint herein.
>
> The Court further finds the weight of the evidence is in favor of the Counter-Defendant and against the Counter-Plaintiff on the Counterclaim.

The defendant argues that the judgment of the lower court is contrary to the manifest weight of the evidence. However, as pointed out so well in Brown v. Zimmerman, 18 Ill 2d 94, at 102: "(t)he findings and judgment of the trial court, in chancery and non-jury cases, will not be disturbed by the reviewing court, if there is any evidence in the record to support such findings." The trial court had the opportunity to see and hear the witnesses and its findings as to credibility will not be disturbed unless manifestly against the weight of the evidence, especially in a case such as this, where there is much testimony which

is directly contradictory. Dailey v. Meredith, 56 Ill App 2d 230; Commerce Union Bank v. Midland Nat. Ins. Co., 53 Ill App 2d 229. An examination of the record in this case indicates that there is ample evidence to support the findings of the trial judge.

For the foregoing reasons the judgment of the trial court is affirmed.

Judgment affirmed.

CONCUR:

Honorable Edward C. Eberspacher

Honorable Joseph H. Goldenhersh

PUBLISH ABSTRACT ONLY.

Filed November 4, 1966

65 IA 2144

No. 66-41

In The

APPELLATE COURT OF ILLINOIS

Third District

Abstract

A. D. 1966

SEATONVILLE SCHOOL DISTRICT NO. 96, BUREAU COUNTY, ILLINOIS, and SPRING VALLEY SCHOOL DISTRICT NO. 99, BUREAU COUNTY, ILLINOIS, AS SUCCESSOR IN INTEREST TO SEATONVILLE SCHOOL DISTRICT NO. 96, Plaintiffs-Appellants, vs. HOWARD HELM, ESTHER HELM, THE LADD COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 94, BUREAU COUNTY, ILLINOIS, and THE COUNTY BOARD OF SCHOOL TRUSTEES OF BUREAU COUNTY, ILLINOIS, Defendants-Appellees.	Appeal from the Circuit Court, General Division, Bureau County.

CORYN, P. J.

Howard and Esther Helm filed a petition with the County Board of School Trustees of Bureau County requesting that an 80-acre tract of farm land owned by them be detached from Seatonville School District No. 96, and annexed to Ladd Community Consolidated School District No. 94. The County Board granted this petition. Seatonville School District No. 96, and its successor in interest, Spring Valley School District No. 99, filed a complaint for review of this decision in the Circuit Court of Bureau County under the Administrative Review Act. The Circuit Court affirmed the decision of the County Board, whereupon the Seatonville and Spring Valley School Districts perfected this appeal.

For a considerable time prior to these proceedings by the Helms,

the Seatonville School District No. 96 had been experiencing continuous financial difficulties because of its low assessed valuation and consequent inability to obtain sufficient tax monies on which to operate. Seeking a remedy for its problem, it entered in discussions with Spring Valley School District 99 for the purpose of having the Spring Valley School District absorb it. At the conclusion of these discussions, a petition was filed with the County Board of School Trustees of Bureau County by the Seatonville and Spring Valley School Districts asking that the Seatonville District be annexed to the Spring Valley District. This petition, and the Helm petition, requesting the transfer of their eighty acres from the Seatonville District to the Ladd District, were heard by the County Board on the same evening. This petition for annextion was also allowed by the Board.

At the initial hearing on the Helms' petition before the County Board, very little evidence was produced by any of the parties. The evidence that was adduced indicates that Mr. and Mrs. Helm own the 80-acre tract of land in question, that it is improved with a dwelling inhabited by persons other than the Helms, and that no children reside on the premises. The Helms reside on a 92-acre tract of land a short distance away, which they farm together with the 80-acre tract. Said 80-acre tract is three miles from Ladd and five miles from Spring Valley, and is bounded on three sides by the Ladd School District. The evidence further indicates that the Helm property has an assessed valuation of $22,750.00.

In its order granting the Helm petition, the County Board of School Trustees found "that it is the determination of this Board that it is to the best interests of the schools of the area and the educational

welfare of the pupils that the change of boundaries as prayed in said petition be granted. . . ." The opinion of the Circuit Court of Bureau County in affirming the action by the County Board stated, in part, that "[I]t is apparent from the record that the educational welfare of the students of the area and of the districts involved will not be materially affected by the granting or denying of the petition."

The School Code provides that the County Board of School Trustees, when called upon to act upon a petition for a proposed change in boundary of a school district, "shall determine whether it is to the best interests of the schools of the area and the educational welfare of the pupils that such change in boundaries be granted. . . ." Ill. Rev. Stat., ch. 122, § 7-6 (1965). Decisions of the County Boards of School Trustees on petitions for change in boundaries of school districts will be reversed by the court if contrary to the manifest weight of the evidence. Oakdale Community Consolidated School District No. 1, et al v. County Board of School Trustees of Randolph County, et al, 12 Ill. 2d 190; McNary v. County Board of School Trustees of Peoria County, 64 Ill. App. 2d 165. In the McNary case, we stated that "[T]he substance of the test announced in these cases [i. e., Oakdale Community Consolidated School District No. 1, et al v. County Board of School Trustees, et al, supra; Trico Community Unit School District No. 176 v. County Board of School Trustees of Randolph County, 8 Ill. App. 2d 494] is that the advantage and detriment to the districts involved, as well as to the educational program of the entire area and the educational welfare of the pupils involved, must be considered as well as the wishes and desires of the residents of the affected area." In Wheeler v. County Board of School Trustees, 62 Ill. App. 2d 467, we stated that "while the personal wishes of the petitioners, standing

alone, will not justify a change from one school district to another, the factor of convenience to the parents and the children is required to be considered. . . ."

We are of the opinion that the instant case is controlled by these principles. The evidence indicates, as the circuit judge correctly concluded, that the best interests of the school districts involved and the educational welfare of the pupils of these districts will not be materially affected by disconnecting the Helm 80-acre tract of land from the Seatonville district (now by annexation the Spring Valley District) and annexing it to the Ladd District. No pupils reside on this 80-acre tract of land, and the assessed valuation of this 80-acre tract is such that its removal from one district and annexation to another will not materially affect the tax revenue of either district. The record herein contains no probative evidence that would support the desire of the Helms to have their 80-acre tract annexed to the Ladd School District. We conclude, therefore, that the petition herein was premature, and that the decision of the Circuit Court of Bureau County affirming the decision of the County Board of School Trustees was contrary to the manifest weight of the evidence. Accordingly, said decision of the Circuit Court is reversed.

Reversed.

Alloy, J. and Stouder, J. concur.

50700

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
ERNEST THOMPSON,
Defendant-Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY
CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of burglary and was sentenced to 1 to 4 years in the state penitentiary. He appeals.

At approximately 5:00 A.M. on December 23, 1964, Chicago Police Officers James Tobin and Richard Schneider were cruising in their squad car when they noticed that part of the glass had been broken out of the front door of the Copa Lounge at 3838 West Madison Street in Chicago. Officer Tobin removed a portion of the remaining glass from the bottom of the door and entered the lounge through the opening. He entered about 10 feet into the lounge when he saw a man, later identified as the defendant, step out from behind the bar and flee towards the rear of the lounge. Officer Tobin ordered him to halt and fired several shots at him. Defendant disappeared into a dimly lit washroom in the rear of the establishment. The officers entered the washroom, found defendant crouched beside the toilet and arrested him. Officer Tobin testified that, after the arrest, he was uncertain whether any one else was in the establishment and ordered defendant to sit next to the juke box while the lounge was searched. Defendant began to argue with the officer, got up and attempted to escape, whereupon Officer Tobin fired a shot into the floor at defendant's feet. Defendant stated to the officer, "I see you mean business." The officers found several bottles of whiskey and gin stacked near the rear door of the lounge. Another bottle of gin was found with

"about a shot or a half of a shot remaining in it." Officer Tobin testified that defendant was "intoxicated, very much intoxicated," was unable to keep his balance and that his speech was very incoherent. The officer further testified that other than the broken glass in the door there was no damage to the lounge or its contents, and that the cash register, the cigarette machine and the juke box were untouched.

Mrs. Barbara Eubanks, the owner of the Copa Lounge, testified that defendant had been a customer at the lounge for about a year, that he was one of her credit customers, and that his uncle was employed by her in the lounge. Mrs. Eubanks further testified that the bottle of gin which was found empty had been full at the time she closed the lounge the night before. She stated that, in examining the establishment, she found some small holes in a towel cabinet and in the rear wall.

Defendant testified in his own behalf and stated that during the evening preceding his arrest he had gone to his union hall after which he played pool with friends, including a Chicago police officer. Around 11:00 P.M. he went to a tavern with a friend, and purchased a pint of whiskey and two beers. Between 2:00 and 2:30 A.M. defendant and his friend went to another tavern and had two more beers. They left the second tavern around 4:00 A.M., and defendant's friend left him at Madison Street and Pulaski Road, one and one-half blocks from the Copa Lounge. Defendant testified that he then walked east along the south side of Madison Street, opposite the Copa Lounge, on his way to a restaurant to get something to eat, when he noticed a man standing in the doorway of the Copa Lounge next to the broken glass door. He looked through the window and saw another man inside the lounge. He yelled to them and told them the police were coming. He testified that he shouted to frighten them

away and when they heard it they ran from the lounge and disappeared up the street. During the flight, one of the men dropped a hat about three doors away from the lounge.

Defendant testified he went to the lounge and saw that no one was inside. He was looking through his wallet for the telephone number of his uncle who worked in the lounge when he heard a shot ring out and someone shout "halt." He turned and saw an officer with a gun, panicked, jumped through the broken door and crawled toward the juke box, about half-way into the lounge. As he was crawling other shots were fired at him. He testified that he did not go any further into the lounge than the juke box, and that he never went behind the bar nor as far back as the washroom. Defendant further testified that he drank no liquor while he was in the lounge and that he began the evening with $25 and had over $17 with him when he was arrested. He stated he was wearing a hooded coat that night and no hat. One of the officers ordered him to put on the hat which was found outside of the lounge but it was too small. Defendant denied breaking into the lounge.

Three persons testified as character witnesses for the defendant, defendant's foreman, his parole officer, and the police officer with whom he had been the night before he was arrested.

Defendant maintains that the State failed to prove him guilty beyond a reasonable doubt, in that it failed to prove he formed the requisite intent to commit theft and more specifically failed to prove that he was capable of forming such intent in view of the evidence of his complete intoxication. In the alternative, defendant maintains that he should have been found guilty, if at all, of criminal damage to property, and that his sentence should be reduced to probation or to a maximum sentence of 1 year to 1 year and a day.

A review of the record reveals no evidence which shows

such intoxication on the part of the defendant which could negate the necessary criminal intent to commit the crime of theft. Defendant's own testimony shows the presence of mind sufficient to form the intent to commit the crime. His testimony relates in detail all of his activities and his associations for the entire evening before he was arrested. He played pool, drank specific amounts of whiskey and beer, drank at two different locations, left the last tavern at a certain time, and the like. Officer Tobin's testimony that defendant was very intoxicated, incoherent and unable to maintain his balance does not of itself mean that defendant was so intoxicated as to have been unable to form an intention to commit theft. While defendant's defense at trial was alibi, whereas he advances intoxication on this appeal, his testimony proves that he was not so intoxicated as to be incapable of forming the intent to commit the crime of theft. See People v. Strader, 23 Ill.2d 13. The trier of fact chose to believe the state's witnesses and we can find no reason in the record to interfere with that determination.

Defendant's contention that the state failed to prove he entered the lounge to commit a crime is unavailing in the light of his attempt to flee and hide from the officers when he was discovered in the lounge and the presence of the whiskey and gin bottles near the back door of the lounge. See People v. Johnson, 28 Ill.2d 441. The facts show that he was guilty of burglary, rather than of criminal destruction or breaking and entering.

Defendant's final contention, that his sentence is excessive, is likewise unavailing in the light of the fact that it was brought out during the hearing in aggravation and mitigation that he had a prior conviction for armed robbery. Under these

circumstances the sentence of 1 year to 4 years in the penitentiary was reasonable.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

50549

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
FRED JONES,
Defendant-Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY
CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of unlawful possession of narcotics and was sentenced to a term of 10 to 15 years in the state penitentiary. He appeals.

The only question raised on this appeal is whether defendant was denied his right to a speedy trial in accordance with the provisions of the Four Term Act. Ill. Rev. Stat. 1963, Chap. 38, Par. 103-5.

Defendant was indicted on February 14, 1964, for the unlawful possession of narcotics on January 28, 1964. He absented himself from the jurisdiction of the court on February 27th, and the indictment was removed from the trial docket and defendant's bond forfeited. The indictment was reinstated on May 21st and defendant was arraigned on May 24th. On May 25th the trial court continued the cause to June 24th. On June 24th defendant answered ready for trial and the trial court continued the cause to August 11th. On August 11th defendant presented a motion to suppress evidence and the trial court continued the cause to August 27th. On August 27th defendant answered ready for trial and the trial court continued the cause to September 3rd. On September 3rd the defendant answered ready for trial and, on motion of the State, the cause was continued to September 9th. On September 9th the motion to suppress evidence was denied after a hearing. Defendant answered

ready for trial and the trial court set the cause down for trial on the following day. On the following day, September 10th, the State filed a written petition for an extension of time under the Four Term Act on the ground that a material State's witness was out of the State and would not be available as a witness until after September 17th. The court and counsel mistakenly believed the Four Term period would expire before the 17th, whereas it was not due to expire until after the 17th. After the assistant State's attorney presented the petition to the court, the following colloquy occurred between counsel and the court:

> "Defense counsel: Judge, I object to any extension of the fourth term act in this case.
>
> "The Court: When will the fourth term run?
>
> "Assistant State's Attorney: It started on May the 15th, so my guess would be about the 13th or the 12th of September, which would be a day after tomorrow.
>
> "Assistant State's Attorney: Judge, chemist Vondrak is the chemist that we have had some problems with. He was injured and was in some type of an accident, and then has taken his furlough. We verified the fact yesterday afternoon with the Crime Lab, and it appears down there that he is out of town definitely and will not be back in town until sometime, they believe, after, I think, the 17th of September. They expect him back then. We are going to run into this on a couple of matters. The Irish case that we are holding on call until tomorrow for the same-- We have another case in the next two weeks that has been extended already to get him in.
>
> "The Court: I know that.
>
> "Assistant State's Attorney: So we will have Mr. Vondrak in daily.
>
> "Defense Counsel: Judge, I object to an extension for more than, oh, say ten days at this time, because--
>
> "Assistant State's Attorney: Well, if your Honor wants to set this sometime in the latter part of September--
>
> "The Court: I will extend the fourth term thirty days from today and set the matter--
>
> "Assistant State's Attorney: Any time before October 9th, your Honor.

"The Court: Yes. That would put it in November, thirty days from today, and we will set the matter in October.

"Assistant State's Attorney: Have you got an open day on the 5th?

"The Court: Yes. October 5th.

"Defense Counsel: We are ready for trial, your Honor.

"Assistant State's Attorney: I would appreciate, Judge, an earlier date, and give this thing precedence.

"The Court: All right. I will give you an earlier date."

The extension was allowed to October 9th, the cause was set for trial on September 24th, and the trial was conducted on September 24th and 25th, some 123 days from the date of defendant's arraignment. At no time after the date of the expiration of the original 120-day period, and before his conviction, did defendant make application for discharge under the Four Term Act.

Whether the State will be allowed an extension of time under the Four Term Act to secure material evidence rests in the sound discretion of the trial court. Ill. Rev. Stat. 1963, Chap. 38, Par. 103-5(c). It appears that the trial court and counsel mistakenly believed that a material witness for the State would be unavailable until some 4 or 5 days after the Four Term period would expire, whereas the witness in fact was to be available some 1 or 2 days prior to the expiration of the Four Term period. In any event, the Four Term period had almost expired, a material witness for the State was unavailable for trial and the trial court allowed the State only so much time as was necessary to produce the witness. Under these circumstances we are unable to say that the trial court abused its discretion in granting the extension.

Defendant initially objected to the allowance of any extension of time in this case, but later waived this objection when he objected to any extension of time over 10 days. Contrary to

defendant's contention, the trial court did not indicate that the extension would be granted over defendant's objection after the objection was made, and forcing him to object to an extension of more than 10 days. The court merely attempted to gather more information about the matter after the initial objection was made by defendant. Furthermore, after the original 120 days had expired, and before he was convicted, defendant failed to make application for a discharge under the Four Term Act. He cannot avail himself of its provisions at this late date. People v. Kuczynski, 33 Ill.2d 412; People v. Walker, 13 Ill.2d 232.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J.,and LYONS, J., concur.

50552

MILFORD C. BERNER and CHICAGO TITLE & TRUST COMPANY, as Trustee under Trust No. 40669,	)	
Plaintiffs-Appellants,	)	APPEAL FROM
v.	)	CIRCUIT COURT,
VILLAGE OF NORTHBROOK, a Municipal Corporation,	)	COOK COUNTY.
Defendant-Appellee.	)	

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is a zoning case, in which plaintiffs seek a declaratory judgment that defendant's single family residential zoning ordinance is null and void as to plaintiffs' vacant land, and that defendant be "mandated to approve" plaintiffs' application to erect multiple dwelling units on its property.

After a nonjury trial on the merits, the court dismissed plaintiffs' amended complaint with prejudice, after finding that (1) the subject property is located in part "of an area which has been zoned, developed and used as a single-family residence area"; (2) the "Plaintiffs failed to meet the burden of proving that the zoning restrictions in question are unreasonable, arbitrary or confiscatory as it affects the Plaintiffs' property for the purposes set out in the amended complaint and in the proofs made in this cause"; and (3) that the highest and best use of the subject property was for single-family residences.

The subject property is in the Village of Northbrook and is located approximately 1,000 feet west of Skokie Boulevard and the four-leaf clover exchange of Edens Expressway at the intersection of Dundee Road, also known as Illinois Highway 68. It consists of three contiguous vacant parcels of land lying south of Dundee Road. Parcel 1 is a three acre tract, with approximately 148 feet

in frontage on Dundee Road, extending southerly from Dundee a distance of approximately 625.55 feet along the east boundary of a railroad. Parcel 2 consists of seven 25-foot lots on Dundee Road, 100 feet in depth. Parcel 3 consists of eleven lots lying immediately east of the three acre tract.

In their original complaint filed on September 21, 1962, plaintiffs alleged they were "desirous of erecting one or more one story office buildings" on the three acre parcel (Parcel 1) and "multiple dwelling units on the seven lots (Parcel 2) fronting on Dundee Road to the east of the three acre parcel." The eleven lots (Parcel 3) were to remain single-family dwellings and to be improved as such.

Evidence commenced on May 15, 1964, and plaintiffs' experts testified as to the highest and best use for Parcels 1 and 2. No testimony was offered as to Parcel 3. As to Parcel 1, the highest and best use was "an office building or several small office buildings, if not one large office building. This would be a benign use and would not be an industrial one." As to Parcel 2, the highest and best use would be "multiple dwellings, which would allow eight multiple-unit dwellings on that 175 feet."

At the conclusion of plaintiffs' testimony, defendant moved "for a directed verdict on the basis that the plaintiff has failed to make a case in the claims set forth in the complaint." In denying the motion, the court's remarks included, "I am convinced that the property along the railroad tracks could not competently be developed for single-family purposes. I think it would be unjust to the landowner to continue that type of zoning. * * * The zoning of that land ought to be changed from a single-family development to a multiple-use development. The land laying there

now is absolutely worthless for a single-family development because of the commercial development along Dundee Road and because of the proximity to the North Western Railroad. * * * I simply can't believe, on the basis of the present testimony, that this zoning that exists today is either proper or is in the best and highest use of this land with the surrounding development. But I do believe that a development, a multiple-family use, would be proper on this site. I was disappointed that the plaintiff hadn't brought in a plan for a development showing something of the nature of the development that would be put in in the event there was a change in the zoning. * * * On the basis of the present testimony--I would say on the justice of the landowner there should be some change in this zoning that would permit a change."

Several witnesses for defendant were then heard and, after a number of continuances, the proceedings resumed on December 17, 1964.

During the period of the continuances and on September 16, 1964, plaintiffs were granted leave to file instanter an amended complaint, in which it was alleged: " * * * the above captioned law suit was filed in which the plaintiffs sought a change in classification of the subject property from its Single-Family District to a Business use. The trial was commenced on these issues and that prior to the conclusion of said trial and prior to the conclusions of the plaintiffs' testimony, the plaintiffs file herewith their Amended Complaint, amending their original request from a Business classification to a Multiple-Family District. * * * Therefore, your petitioners are filing herewith their Amended Complaint to bring this Court the entire issue of the zoning classification of the subject property."

The prayer of the amended complaint was "that the plaintiffs shall have the right to erect multiple dwelling units proposed to be erected by them on their property."

At the resumption of the trial, plaintiffs were permitted to introduce testimony and exhibits showing a typical multiple-dwelling unit proposed for the area. Three alternate plans were proposed for the three parcels, approximately six acres. Plan A provided for 64 units (4 units to a building) and 9 single-family dwellings; Plan B provided for 56 units (14 buildings) and 11 single-family dwellings; Plan C provided for 100 individual family units with 4 units in a building and a total of 25 buildings.

Defendant's witnesses included experts and home owners, and all testified that the highest and best use for the subject property was single-family dwellings, its present classification.

After both sides rested, the court remarked, "If I should permit the erection of multiple dwellings on this piece of land, it would amount to spot zoning because the entire--it is all single-family residences in the immediate vicinity. There are no provisions for multiple-family residences. I reluctantly hold that the plaintiff in this case has not set forth sufficient reasons whether or not the zoning should be changed." Thereafter the declaratory judgment was entered as previously noted.

In its brief and on oral argument, counsel for the Village pointed out that plaintiffs' evidence did not support the multiple-family relief sought in plaintiffs' amended complaint--plaintiffs' expert witnesses recommended office buildings for the three acre tract and multiple units for the seven lots fronting on Dundee Road, with no recommendation as to the eleven inside lots. We agree.

Plaintiffs' counsel argues that his evidence did support his

original complaint, but that plaintiffs filed the amended complaint on the basis of the remarks made by the trial court in ruling on defendant's motion for a directed verdict.

Plaintiffs further argue that this court, in determining the merits of this appeal, should include in its consideration plaintiffs' original complaint, because plaintiffs would not have filed their amended complaint except for the remarks of the trial court, and that plaintiffs were taken by surprise when the court announced its "reluctant" finding against plaintiffs. This cannot be done at the present posture of this appeal. An examination of the pleadings leaves no doubt that the original complaint was withdrawn. In Bowman v. County of Lake, 29 Ill.2d 268, 193 N.E.2d 833 (1963), our Supreme Court said (p. 272):

> "Where an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn."

After considering the entire record, including the remarks of the trial court, we have concluded that plaintiffs should be given an opportunity to amend their pleadings and their request for relief to conform with their proof, and the entire matter to be reconsidered and determined by the trial court in the light of the evidence heretofore introduced and such additional evidence as may be offered by both sides.

For the reasons given, the declaratory judgment order is reversed and the cause is remanded with directions to proceed in accordance with the views expressed herein.

REVERSED AND REMANDED WITH DIRECTIONS.

KLUCZYNSKI, P.J., and BURMAN, J., concur.

Abstract only.

50200

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ALEXANDER GRIFFIN, Defendant-Appellant.	)	APPEAL FROM THE CRIMINAL COURT OF COOK COUNTY.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Upon a bench trial the defendant was convicted of rape and sentenced to serve three to eight years in the state penitentiary. His brief raises many points, some of which do not appear to be relevant, but in essence, the principal contention is that the evidence on behalf of the State fails to show beyond a reasonable doubt that defendant had intercourse with the prosecutrix by force and without her consent.

The prosecutrix, Miss Patricia Eason, testified that on August 27, 1963, at approximately 2:45 a.m., as she was on her way home from a visit with a girl friend, she was approached by defendant on the east side of the 6100 block of South Woodlawn Avenue, Chicago; that defendant had a gun in his hand and told her that if she did not want to get hurt, to come with him; that she begged him not to "bother her," because she had given birth to a baby only three weeks before; that he ignored her protests and took her at gunpoint through a gangway and into an alley, where he demanded that she expose herself to him; that she refused to comply, and that the defendant then undressed her and proceeded to have intercourse with her in an upright position. She further testified that he held the gun at her side during the inter-

course and that hence she did not scream; that the police arrived while they were still engaged in sexual relations; that they turned their flashlights on defendant, who thereupon threw his gun into a vacant lot nearby, while she ran to the police crying, "He raped me." The police took defendant into custody. Miss Eason maintained that the defendant was a stranger to her and that she had never been out with him socially.

On cross-examination, the prosecutrix said she was 21 years old at the time of the occurrence, that she had never been married, and that she had one child and was pregnant at the time of the trial. Defendant's counsel sought to question her concerning her age when she first had sexual intercourse and whether she had had sexual relations with other men during the prior year. Counsel for the State objected, and the objections were sustained.

Police officers Morgan Iverson and James White testified that pursuant to a conversation with an unnamed individual, they entered the alley in question and beamed their flashlights on defendant and the prosecutrix who were in the act of intercourse. They said that defendant upon observing them, threw a gun to the ground and that they recovered it and found it to be loaded. Officer Iverson said that the prosecutrix's skirt was above her waist and that her pants were down, that defendant's pants were unzipped and that he was exposed. He further testified that he asked the defendant why he had a gun in his possession and that defendant replied that there "had been break-ins in the building" in which he lived; that he said the prosecutrix

was his "old-lady," but that when he questioned him as to why he would have intercourse with his girl friend in an alley, defendant had no reply. Officer White added that defendant claimed that Miss Eason was his girl friend and that she denied this immediately and in defendant's presence.

Defendant testified that he had known the prosecutrix for some months, that he had had "social relations" with her and had spent a night with her in a hotel. He said that on the night in question, the complaining witness came up to him on the street, suggesting that they take a walk around the block; that they walked up the street and through a gangway into the alley; that they started talking; that he began to kiss her and that this led to intercourse. Defendant admitted possession of the gun, but denied using it to threaten the prosecutrix. He also admitted throwing the gun to the ground when the police arrived, but did not explain why he did so. He maintained on cross-examination that he had been going out with the prosecutrix for four or five months prior to the alleged rape and had introduced her to his friends. No witnesses were produced by defendant, however, to corroborate this portion of his testimony, nor was any other evidence adduced on his behalf at the trial.

When an individual is charged with the crime of rape, the State must prove beyond a reasonable doubt that the act of intercourse was performed forcibly and against the will of the victim (Ill. Rev. Stat., ch. 38, § 11-1(a) (1963)), and as the defendant urges, where the prosecutrix is in possession of her faculties and physical powers, the State's evidence must

show such resistance on her part as demonstrates that the act was against her will. People v. Smith, 32 Ill. 2d 88, 203 N.E.2d 879; People v. Fryman, 4 Ill. 2d 224, 122 N.E.2d 753. Nonetheless, resistance to rape is not necessary under circumstances where resistance would be futile and would endanger the life of the victim. People v. Smith, supra; People v. Faulisi, 25 Ill. 2d 457, 185 N.E.2d 211.

The testimony of the State's witnesses, if believed, sufficiently establishes the crime of rape. The testimony of defendant raises certain conflicts in the evidence which must be resolved by the trier of fact. In the case at bar, the trial judge's function was to make such determination. In People v. Reaves, 24 Ill. 2d 380, 183 N.E.2d 169, the court said, at 382:

> "It is the duty of the court in a bench trial to determine the credibility of the witnesses and the weight to be given their testimony, and unless the evidence is so improbable or unsatisfactory as to leave a reasonable doubt of defendant's guilt, the finding of the court will not be disturbed."

In viewing all the evidence, it cannot be said it was improbable or unsatisfactory. Defendant had a gun and said the prosecutrix was his girl friend, but he knew nothing about her or her family. The victim at all times denied knowing or having seen the defendant prior to the night in question, and she made an immediate outcry at the arrival of the police. There was sufficient evidence to find defendant guilty of rape beyond a reasonable doubt.

During oral argument before this court, the attorney

for the defendant said he had inadvertently omitted from his Points and Authorities a point which he believed bore on the issue of consent; that is, that it was error for the trial court to restrict defendant's cross-examination of the prosecutrix with respect to her previous sexual experiences. Counsel was given leave to file an additional brief on that point, but has failed to do so. It is the rule in Illinois that a defendant in a rape case may introduce evidence of a complainant's general reputation in the community as tending to prove her consent, but he may not adduce evidence of specific incidents of unchastity. People v. Cox, 383 Ill. 617, 50 N.E.2d 758; People v. Collins, 25 Ill. 2d 605, 186 N.E.2d 30. Defendant's counsel sought to question the prosecutrix as to specific acts of intercourse with other men. The trial court was correct in sustaining the State's objections.

Judgment affirmed.

Sullivan, P.J., and Dempsey, J., concur.

Abstract only.

50587

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
JOHNNIE WEBB, JUNIOR,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

The defendant herein was found guilty of the crime of rape. The case was tried by the court without a jury. Defendant raises only one point in his brief, namely, that the uncorroborated testimony of the complainant was not sufficient to support a conviction of rape.

On May 20, 1963, Willa Mae Taylor was raped in an alley between Aberdeen and Carpenter near 72nd Street in Chicago. The victim testified that at approximately 11:00 or 11:30 P.M. on May 20, 1963, an assailant accosted her on 72nd Place in an alley between Aberdeen and Carpenter in the City of Chicago. He held a shiny and cold, sharp object to her neck, and dragged her down the alley. He threw her to the ground along side a garage and told her to get her pants down as quickly as she could. He cautioned her not to cry out. The assailant told her to get her panties and girdle off quickly. Apparently she did not act quickly enough and the assailant reached out and tore the girdle from her hips. He then fell on top of her. The victim told the assailant of her fear of injury, stating that she had recently had a child, to which the defendant replied that he didn't believe her. After the act of intercourse she got up and the assailant dusted the dirt out of her hair and assisted her down the alley. He asked the victim where she lived

and she pointed to the back of a house on which there was a porch light. He also asked her what her phone number was but she gave him a fictitious phone number. When the victim was released she ran around a gangway to the front of a neighbor's house and knocked on the door. She told the neighbor what had happened and the neighbor called the victim's husband and the police. The victim also testified that one evening about two weeks prior to the night of the rape, she had seen the defendant as she was getting off the bus and walking toward her home. On that evening the defendant had walked her home in the presence of another lady. On May 25, 1963, while the victim was out walking with her husband she saw the defendant at 74th and Peoria at about 7:30 or 8:00 o'clock in the evening. Her husband pulled a pistol from his pocket and held the defendant at gun point while the victim went into a delicatessen and called the police. She went to the police station with the police and the defendant. At the police station the victim told her story and defendant neither denied nor affirmed what she said to the police officer but remained silent.

Thomas Byrne, a police officer, testified that he took a statement from Mrs. Willa Taylor, the victim, which she signed in his presence. He also testified that the defendant never made any admissions of raping Mrs. Taylor to him.

The defendant testified that at the time of the occurrence he had just attained the age of 17, and that he lived at home with his stepmother and father and sister. He attended Hyde Park High School, and was in his third year.

He further testified that the first time he ever saw Willa Mae Taylor was at 74th and Peoria on May 25, 1963. He denied having raped her, and denied that he was present in an alley on May 20. He further testified that when the arresting police officers came to the location where he was being held at gun point by Mr. Taylor he told the police officers that the young lady was mistaken. He further stated that he did not say anything at the police station although he was present when the complaining witness gave her statement. According to his testimony, he was at work at the Jackson and Dearborn lower subway station at 10:30 P.M. on May 20, 1963, where he had worked from 4:30 to 11:00 P.M. He left work at 11:00, and stated that when he goes home he catches the "Englewood El," and rides to 63rd and Halsted. He then gets off there and catches the bus to ride to 74th and Halsted, where he gets off and walks one block east to Emerald. He further testified that he usually got home from work about quarter to 12:00. On May 20, 1963, he did not see anybody on the way home whom he knew.

The defendant's sister, age 14-1/2, testified that after a religious meeting from 7:00 to 8:00 P.M. on May 20, 1963, she finished her homework and watched television, and that night her brother, Johnnie Webb, Jr. came home at a quarter to 12:00.

Eddie Mae Webb testified that she has been married to Johnnie Webb, Sr. for eleven years, and that she has three children from her husband's previous marriage. On May 20, 1963, Johnnie Webb, Jr. came home at about quarter to twelve when she gave him dinner. She did not remember exactly what her son was wearing on that night.

Willa Mae Freeman, a defense witness, testified that she was Johnnie Webb, Jr.'s employer on May 20, 1963; that on that date they closed the stand at 11:00 and they both walked together to the State Street subway. She said she left the defendant somewhere between five and ten minutes after 11:00.

Detective Robert Davis testified that on May 21, 1963, he was a police officer and had occasion to see Willie Mae Taylor and talk to her, and make a supplemental report of the incident. The victim stated to him that while walking home in the 7200 block of Aberdeen on the 20th day of May she was approached by a male negro who grabbed her and pushed her down into an alley in the rear of 7211 South Aberdeen. She also related the other details of the crime and then stated that she had seen the offender about two or three weeks prior to the offense, when he offered to walk with her and another lady to their homes, which he did and that he seemed very nice then. She thought nothing of it until she saw him again on the night of the rape. The officer said there were no visible physical injuries on the body of the victim, and he did not recall if she complained of any injury. He also had occasion to record in his report the results of a smear test taken at the County Hospital of the complaining witness. The State objected to the introduction of the officer's report into evidence and the objection was sustained.

In support of defendant's argument that the uncorroborated testimony of the complainant was not sufficient to support the conviction, the defendant contends that the State failed to produce the following corroborative evidence which should have been available:

The neighbor, to whom the victim stated she made an immediate complaint, did not testify. The police officer who responded to the call of the neighbor did not testify. The report of the police officer, and the result of the smear test taken at the Cook County Hospital, were not admitted in evidence, and the complaining witness's torn panties and girdle were not introduced into evidence or accounted for.

In People v. Mack, 25 Ill. 2d 416, 185 N.E.2d 154, a similar contention was made by the defendant and the court on page 420 said:

> "We do not, however, regard these cases as establishing an inflexible rule of law requiring in all cases that the testimony of the complaining witness in a rape case must be corroborated. Indeed, we have frequently stated that corroboration is not necessary where the testimony of the complaining witness is clear and convincing. (People v. Walden, 19 Ill. 2d 608; People v. Trobiani, 412 Ill. 235, 240; People v. Polak, 360 Ill. 440, 445.) The unvarying rule of law is that in a rape case as in any criminal case, the evidence must be sufficient to establish the guilt of the defendant beyond a reasonable doubt. Where we have reversed cases because of failure to corroborate the testimony of the complaining witness, we have done so not because of any fixed rule requiring corroboration but because, upon the state of the record in the particular case, the evidence left a reasonable doubt as to the guilt of the defendant. Most of these cases involved situations where the evidence was conflicting on the question of whether or not the complaining witness had actually been raped, and we have held that, in such cases, there should ordinarily be additional evidence to corroborate the testimony of the complaining witness. In this case, however, the disputed testimony is not on the issue of whether the crime was committed, but, rather, on the identity of the defendant as the person who committed the crime. Although the record suggests that it would have been possible for the State to have produced additional corroborating evidence, such evidence would have merely strengthened the uncontradicted testimony of the complaining witness that she had been robbed and raped. It would have shed no light on the disputed question of the identity of the defendant as the person who committed these crimes. The testimony of the complaining witness is not inconsistent nor does there appear to be any reason for

> regarding it as unworthy of belief. Under these circumstances, we cannot say that her testimony is insufficient to establish the crime of rape, without further corroborating evidence."

In the instant case the issue was not whether the complaining witness had been raped, or whether the crime was committed, but, rather, it related to the question of the identity of the defendant as the person who committed the crime. As was pointed out in People v. Mack, supra, the so-called corroborating evidence would have shed no light on the disputed question of the identity of the defendant as the perpetrator of the crime.

We next turn to the question of whether the testimony of the complaining witness was clear and convincing. The defendant cites the case of People v. Szybeko, 24 Ill. 2d 335, 181 N.E.2d 176, and contends that the facts in that case are quite similar to those of the instant case, however, we see very little similarity between the facts in the two cases. In the Szybeko case, supra, the defendant admitted knowing the prosecutrix for eight or nine years, having gone to the same school. He admitted having seen her the night of the alleged attack, however, he testified that he had quite a few drinks that night and fell asleep and almost crashed into a viaduct as he was driving the prosecutrix home. He then told her that he would not drive all the way downtown, and suggested she take a bus and gave her money when she said she had none. He also testified that he let her out of the car at a bus stop. After driving only a few feet he saw one Mary Scannell, another schoolmate who lived in the neighborhood, who was out walking her dog. He stopped and after some conversation he suggested going to a restaurant for coffee. Miss Scannell took the dog

into the house and the two drove to a restaurant only to find it closed. The defendant testified that at that point he became ill and vomited and fell asleep until awakened the next morning about 8:00 A.M. by another acquaintance, who corroborated the fact that he had awakened the defendant, and also that he had noticed vomit both on the inside and the outside of defendant's car, and that when the car keys could not be found he had gone to Mary Scannell's house at the defendant's suggestion and obtained the keys from her. Mary Scannell corroborated his testimony.

The court there found that the proof did not show that the prosecutrix spontaneously or voluntarily complained that she had been raped, but only after questioning some seven hours after arriving home did she state what happened.

In the instant case the testimony of the complaining witness, that after the attack she immediately ran around a gangway to the front of a neighbor's house and told the neighbor what had happened, and the neighbor called her husband and the police, is not questioned or denied. None of the testimony regarding the attack or regarding the rape was questioned in any way by the defendant. His sole defense was based upon a denial by the defendant that he committed the rape, and, assuming a rape had been committed, that he was not the assailant. As we read the Szybeko case, supra, it is not controlling in a case such as this.

The testimony of the complaining witness in this case was consistent on all essential facts concerning the crime and the identity of the defendant. There were minor

discrepancies which we think are of little importance. At the trial she stated that she had seen the defendant previously as she was getting off a bus. Another time, before trial, she said she had seen him on an elevated train. On one occasion she said that the defendant had told her, "I got you now, don't holler," and at another time she said the defendant told her, "I have got you now, if you scream, I'll kill you."

The trial of this case took place approximately one year after the crime, and when the complaining witness was confronted with slight inconsistencies she stated that her prior statement was made right after the incident when her memory was much fresher. It was the duty of the trial judge in this case to weigh these minor inconsistencies in determining the credibility to be accorded to the witness.

The defendant argues that the alibi evidence required a reversal of this case. The defendant denied having raped the complaining witness. He stated that he left work in the loop at about 11:00 o'clock on the night in question and arrived home at 11:45. His employer also testified that he left work at about 11:00 o'clock. His testimony of the time he arrived home was supported by his stepmother and sister. The testimony of the witnesses as to the exact time he arrived home is not precise. The State argues that it is quite possible that defendant could have left work at about 11:00 P.M., arrive at 72nd Street at about the time he knew the victim would come home and in the area where he knew she lived, raped her and arrived home near the time of his usual arrival. There is nothing in the record which would indicate that the People's contention is implausible.

In People v. Setzke, 22 Ill. 2d 582, 586, 177 N.E.2d 168, the court said:

> "This court cannot say on this record that the testimony of the State's witnesses is unworthy of belief, or that defendant's evidence required a finding of not guilty. There is no obligation on a trial court to believe alibi testimony over positive identification of the accused, even though the alibi testimony may be given by a greater number of witnesses. People v. Lamphear, 6 Ill. 2d 346; People v. Wheeler, 5 Ill. 2d 474."

From an examination of the record in this case we are satisfied that the evidence of the complaining witness was clear and convincing and since it is the function of the trier of the facts to determine the credibility of the witnesses, we cannot say that the guilt of the defendant has not been proven beyond a reasonable doubt.

Judgment affirmed.

Schwartz and Dempsey, JJ., concur.

Abstract only.

50582

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TOBEY BOONE, A/K/A TOBEY RICHARDSON, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

After a bench trial, defendant was found guilty of voluntary manslaughter and was sentenced to 5 to 15 years. On appeal defendant contends that (1) the corpus delicti was not proved; (2) she was not proved guilty beyond reasonable doubt; and (3) she acted in self-defense.

Early on the morning of November 15, 1964, in the immediate vicinity of a tavern, defendant shot and killed Roy Richardson, her "common-law" husband of some 22 years. They had continued living together in an apartment (about 60 to 80 feet from the tavern), although Richardson had been "seeing" another woman, Zola Mae Walker.

A bartender testified that the defendant came into the tavern for cigarettes about 12:25 A.M. Shortly thereafter, Mrs. Walker came in, left, and then returned with Richardson. Defendant spoke to Richardson, and they stepped outside. Richardson returned after a minute or two and stepped up to a telephone booth occupied by Mrs. Walker. Defendant started back into the tavern, and Richardson stepped out again. About a minute later, the bartender heard a shot and found Richardson dead on the sidewalk outside the tavern.

A State's witness, Betty Lou Anders, testified she was walking toward the tavern, intending to purchase cigarettes, when she noticed the defendant standing, facing her, in front of the

tavern. She saw a man come out of the tavern doorway, and the hand that she could see was empty. Defendant had "a dark object or a dark bag in one hand." The witness was about eight feet away when she heard a shot, and "he staggered to the left and fell." The witness ran, because "I thought she was shooting at me." She further stated that the defendant and man were about three to four feet apart and did not come into "physical contact with one another." She had seen the defendant in the neighborhood over a period of years, but was not acquainted with her, nor did she recognize the victim at the time of the shooting.

On cross-examination, Mrs. Anders testified that she was a widow and had been visiting with her father-in-law. She had visited him frequently, and she had been going to the tavern every evening for the past four years. She knew Richardson and Mrs. Walker, and that "they were going around together." She frequently visited another tavern with Mrs. Walker.

Defendant testified and admitted that she shot Richardson. She stated she entered the tavern after she had seen Richardson enter it with Mrs. Walker. When she tried to talk to Richardson, he swore at her, and they walked outside, and he hit her and knocked her down. He went back into the tavern and came out and ran around the corner toward their apartment and returned a few minutes later with a brown paper bag in his hand. As he tried to open it, "he said, 'I'm going to kill you,' * * * and we struggled and somehow I got the gun and I shot him. I begged and pleaded with him not to hit me any more." Defendant further testified that Richardson usually carried a gun in a brown paper bag.

We find no merit in defendant's contentions. As to the proof of the corpus delicti, the record contains a stipulation that

a coroner's pathologist, "who posted the body of Roy Richardson of 3159 West Washington Street," would testify "that the cause of death was a gunshot wound of the pulmonary artery." In People v. Franklin, 415 Ill. 514, 114 N.E.2d 661 (1953), it is said (p. 519):

> "The test is whether the whole evidence proves the fact that a crime was committed and that the accused committed it."

We conclude that proof of the corpus delicti was made. As to defendant's contentions that she acted in self-defense, and that she was not proved guilty beyond a reasonable doubt, the record contains the testimony of an eyewitness who said that defendant shot Richardson when he was about three to four feet away, and that they did not come into "physical contact" with each other. Defendant denies this. The credibility of the eyewitness and of the defendant was a question for the trial court, and in a bench trial in a criminal case, a reviewing court, in view of the opportunities of observation available to the trial court, will not disturb a guilty finding unless the proof is so unsatisfactory or implausible as to justify a reasonable doubt as to defendant's guilt. (People v. Woods, 26 Ill.2d 582, 585, 187 N.E.2d 692 (1963); People v. Boney, 28 Ill.2d 505, 510, 192 N.E.2d 920 (1963).) We conclude the evidence here supports the trial court's finding of voluntary manslaughter.

For the reasons given, the judgment of the Criminal Division of the Circuit Court of Cook County is affirmed.

AFFIRMED.

KLUCZYNSKI, P.J., and BURMAN, J., concur.

Abstract only.

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51089

MITCHELL J. ALSTER, Plaintiff-Appellant, vs. CHICAGO TASTEE-FREEZ CORPORATION, ALVIN D. ROSE, Defendants-Appellees.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff, Mitchell J. Alster, pro-se, from an order of the Circuit Court entered on May 7, 1964, striking and dismissing his complaint against defendants, Chicago Tastee-Freez Corporation and Alvin D. Rose, with prejudice.

The record shows that plaintiff filed his complaint on November 13th, 1962, which was stricken on motion of defendants in an order entered on January 24th, 1963, which recited that leave was granted to plaintiff to file an amended complaint. On June 17th, 1963, the amended complaint was stricken on motion of defendants and plaintiff was granted leave to file a second amended complaint. The defendants again moved to strike this second amended complaint and on November 14th, 1963, plaintiff, in a written motion, waived argument on this motion and moved to file a third amended complaint instanter. He represented to the court that as a result of advice he received from several attorneys he revised and condensed the complaint "into simple and comprehensive wordage" and that he "now believed that the Third Amended Complaint will sufficiently satisfy the requirements for the simplicity and conciseness desired by the Court and the Illinois Civil Practice Act" and that "it is believed the complaint now sufficiently states causes of action and contains specific prayers upon which relief can be granted." Leave was granted plaintiff to file a third amended complaint.

On May 7th, 1964, on motion of the defendants, an order was entered striking the third amended complaint and dismissing the action against Chicago Tastee-Freez Corporation and Alvin D. Rose, defendants, with prejudice. It is from this order that plaintiff filed his appeal. In said order the court specifically found and concluded that:

> It appearing to the court that:
>
> 1. Said Third Amended Complaint does not contain substantial averments of facts necessary to state any cause of action at law.
>
> 2. Said Third Amended Complaint does not contain a plain and concise statement of the pleader's cause of action.
>
> 3. Said Third Amended Complaint is insufficient in substance and in form and does not define the issues.
>
> 4. The prayers for relief contained in said Third Amended Complaint are not sustained by allegations of the said Complaint.
>
> 5. Said Third Amended Complaint is replete with conclusions of law and opinion.
>
> 6. Said Third Amended Complaint is replete with immaterial matter.
>
> 7. Said Third Amended Complaint pleads evidence.
>
> 8. Said Third Amended Complaint is completely unintelligible.
>
> 9. The plaintiff has had four opportunities to file a proper complaint herein and that prior hereto, three complaints filed herein have been stricken.

In his brief plaintiff states that he "does not raise an issue that his early pleadings were acceptable." In his reply brief the plaintiff concedes that his third amended complaint does not contain a plain and concise statement; that it is insufficient in substance and form; admits that the prayers for relief are not

clearly sustained by allegations in said complaint; that it is replete with conclusions of law and opinion; that it is replete with immaterial matter and that it pleads evidence, but he says the fourth amended complaint which is appended in his brief corrects these conditions. In this court plaintiff takes the position that we should order the Circuit Court to grant him leave to file his fourth amended complaint.

The record shows that an order was entered on June 8, 1964, denying plaintiff leave to file his fourth amended complaint. However, no appeal was taken from that order. The record is clear that plaintiff appealed only from the order entered on May 7th, 1964, which struck his complaint and dismissed the action. It therefore follows that plaintiff elected to stand on his pleading and the court dismissed his third amended complaint with prejudice. The plaintiff conceded by his own actions in the Circuit Court that his second amended complaint should be stricken and now in this court he admits that his third amended complaint substantially contained the same faults as his previous pleadings.

"The trial judge has broad discretion in permitting or refusing amendments and we will review only a manifest abuse of such discretion." Lowrey v. Malkowski, 20 Ill.2d 280, 170 N.E.2d 147. We have examined the amended complaint mindful of the liberal policy towards admitting amendments to pleadings, and we too conclude that the court properly sustained a motion to strike.

The trial court should be liberal in the allowance of proper amendments, but this policy does not require that a party be repeatedly permitted to file pleadings which do not serve to cure the defects upon which the court has ruled. Here the plaintiff persisted in an attempt to present a claim which did not state a cause of action.

We cannot say that the trial court abused its discretion after the plaintiff had four opportunities to state a cause of action. We also note that the original complaint and the first amendment thereto were stricken by a different judge than the one that struck his second and third amendment. For the reasons indicated we are of the opinion that the trial court did not err in dismissing the third amended complaint and the judgment of the Circuit Court is therefore affirmed.

JUDGMENT AFFIRMED.

KLUCZYNSKI, P.J., and MURPHY, J., concur.

Abstract only.

M50270 - 50271

THOMAS PAULSON, d/b/a PAULSON PLASTERING SERVICE, Plaintiff-Appellee,	APPEAL FROM
vs.	MUNICIPAL DISTRICT
JOSEPH ADES, Defendant-Appellant.	CIRCUIT COURT
	COOK COUNTY.

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This is an appeal taken by Joseph Ades, defendant, from the finding and judgment entered by a magistrate sitting in the First Municipal District of the Circuit Court of Cook County, Illinois, in favor of Thomas Paulson, d/b/a Paulson Plastering Service, and against the defendant, Joseph Ades, for the sum of $1,550.00 and costs.

Plaintiff has failed to comply with Rule 5(m) of this court in that he has filed no brief and the time for filing same has long since expired. Under these circumstances there is no duty imposed upon us to fully discuss the case in the light in which it appears from a study of defendant's brief and abstract. We are warranted in reversing the judgment without further consideration. Tabron v. Pleasant, 64 Ill.App.2d 367, 212 N.E.2d 312; 541 Briar Place Corp. v. Harman, 46 Ill.App.2d 1, 196 N.E.2d 498; Ogradney v. Daley, 60 Ill.App.2d 82, 208 N.E.2d 323; Wright v. Chicago Transit Authority, 43 Ill.App.2d 408, 193 N.E.2d 597; C.I.T. Corp. v. Blackwell, 281 Ill.App.504.

Moreover, review of the record and arguments presented to us, though ex parte, prompts us to conclude that plaintiff's failure to contest the appeal is tantamount to confession of error. Tabron v. Pleasant, 64 Ill.App.2d 367.

The judgment of the Circuit Court as to defendant, Joseph Ades, is reversed with judgment here in his favor.

REVERSED.

DRUCKER, P.J., and ENGLISH, J., concur.

Publish Abstract Only.

50376

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN D. BLACKMAN, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Upon a trial without a jury, defendant was convicted of the illegal possession of narcotics and sentenced to a term of two to six years in the penitentiary. Defendant charges, among other points, error in the ruling of the trial court denying his motion to suppress as evidence narcotics found upon his person at the time of his arrest. On oral argument this point was waived and we need not consider it. Other errors alleged are that the trial court abused its discretion in denying defendant's requests for continuances made by him in person at the hearing on the motion to suppress and before trial, that the trial judge was prejudiced, and that defendant did not get a fair hearing on the motion to suppress nor on the trial because of the prejudice of the judge. The facts follow.

Defendant was found unconscious on the floor of the washroom of a gasoline station. He had in his hand a hypodermic needle and a syringe and in his shirt pocket was a packet of heroin. The owner of the station said he had seen defendant and another man enter the washroom together, but that only the second man left the room. After what seemed an extraordinary length of time, the owner peered beneath the door and saw defendant lying on the floor. He summoned the police,

who testified that they did not have a warrant, but that they could see underneath the door and saw that defendant had a hypodermic needle and a syringe in his hand. They broke the door in, searched defendant for identification and found the heroin.

Defendant presented a motion to suppress the narcotics from evidence as the product of an unlawful search, and a hearing was scheduled on the matter. At the start of the proceedings the defendant, who was represented by counsel, spoke on his own behalf and requested a continuance. The court said it was ready to hear the motion; that defendant had been before three judges prior to that time; and that he could not understand why he wanted a continuance. The following colloquy then took place between defendant and the judge:

"Defendant: I would like to add something more to the motion to suppress.

The Court: Well, tell the Court. We will see it's in there and we will go ahead.

Defendant: Can you pass it for a few minutes?

The Court: What do you want in there that's not in there now?

Defendant: I want that the arrest shouldn't be admissible. This is a motion to suppress evidence.

....

The Court: That will come out in the evidence. You are entitled to a motion to suppress the evidence and you will have every opportunity to show the surrounding circumstances of the arrest."

Defendant's counsel said he was ready to proceed, evidence was presented on behalf of defendant, and the court then denied

the motion to suppress the evidence.

The court then inquired if defendant was ready to proceed to trial. Defendant conferred with his counsel, and the attorney said that defendant wanted a continuance. The judge gave a detailed explanation of what occurred at the hearing on the motion to suppress and of the issues resolved there. He then attempted to find out why defendant was seeking a delay, and the following exchange took place:

"The Court: Now, you are entitled to a trial. I can't see any reason to continue your matter. You have been here now for some time, and you don't need any witnesses or anything. There are no witnesses you could bring in.

Defendant: I may use a witness.

The Court: What could the witness testify to?

Defendant: I am contending not having any knowledge of any narcotics.

The Court: That's a matter of the trial."

At that point the matter of a continuance was dropped and the cause was set for trial later the same day.

In deciding whether the trial court erred in denying the defendant's requests for a continuance, the law is well settled that the denial or granting of a continuance lies within the discretion of the trial court and his decision will not be disturbed unless the accused can show that his rights were prejudiced thereby. People v. Solomon, 24 Ill. 2d 586, 182 N.E.2d 736; People v. Ritchie, 66 Ill. App. 2d 417, 213 N.E.2d 306. Applying that principle to the instant case, it appears that neither of the requests of defendant for a continuance were supported by a suggestion or offer that

he could obtain evidence which would warrant a continuance. He gave no reason why he should be given additional time. In his second request for a continuance, he said he wanted to use a witness, but did not specify what the witness would testify to, nor that the witness could produce any material evidence. The trial judge appears to have been patient and considerate and there was no error in the denial of the defendant's requests for a continuance.

Defendant's claim that the trial judge was prejudiced is entirely unfounded. His brief on that point merely reiterates that portion of the proceedingsbefore cited which relate to the requests for continuances, the denial of which appears to be the basis for the charge of prejudice. The trial court's rulings were correct and the judgment is affirmed.

Judgment affirmed.

Sullivan, P.J., and Dempsey, J., concur.

Abstract only.

50589

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. THEODORE REDD, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY CRIMINAL DIVISION

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This case is before us on appeal from a judgment of the Circuit Court of Cook County, finding the appellant, Theodore Redd, guilty of the crime of possession of narcotics. Appellant received a sentence of from two to ten years in the state penitentiary.

A search warrant was obtained on the basis of a complaint signed by one Juanita Booth. In the complaint she alleged that she had seen the appellant in possession of narcotics in an apartment at 4838 South Michigan Avenue, Chicago, Illinois. Armed with the search warrant Chicago Police officers Melvin Alexander and Thomas Strom went to the address set out in the complaint. Appellant Redd opened the door and admitted the officers, who had informed him of their position and that they had a search warrant. In the ensuing search of the apartment, the officers found five tin-foil packets containing narcotics on top of the television set and an additional packet in a box, which also contained three hypodermic needles. Another needle was found in a pair of pants which belonged to the appellant. On examination by Charles Vondrak, a chemist, it was determined that the packets contained a form of heroin.

At the time of the search of the apartment, the appellant admitted that the packets of heroin belonged to him. At his trial, however, appellant stated that he never told the police that the narcotics were his, even when one of the officers allegedly beat him. Appellant, however, did say he was a user of narcotics.

The appellant raises the following issues on this appeal: There was no probable cause to issue the search warrant; the state

erred in not electing to produce the person who executed the affidavit in support of the warrant; and the warrant was deficient in that it did not contain an adequate description of the place to be searched or of the things to be seized.

The complaint made in support of the request for a search warrant alleges that Juanita Booth "...saw narcotics in the possession of the Leasee Theodore Redd alias Bull... ." Appellant claims that the description of him as lessee of the apartment was a crucial mistake of fact, in that the lessee of the apartment was not the appellant but his brother, and that for this reason there was no probable cause to issue the search warrant. Appellant's point is of no merit. There can be no question that on a fair reading of the language in the complaint, the informer saw narcotics in the actual possession of Theodore Redd. To construe the statement quoted above to mean that the possession of the narcotics was the constructive possession of the lessee, appellant's brother, would be to strain the meaning of the complaint beyond all reasonableness. The use of the word "lessee" was descriptive only, and can have no effect on the issue of the validity of the search warrant in this case. In any event, the existence of probable cause is an issue in the first instance for the magistrate before whom the complaint for a search warrant is made, and for the trial court which reviewed the action of the issuing court on the motion to quash. People v. Dolgin, 415 Ill. 434, 114 N.E.2d 389. There was no showing that there was an abuse of judicial discretion in the issuance of the search warrant in this case.

Appellant next contends that the motion to quash should have been granted because the informer who signed the affidavit in support of the warrant did so under an alias and was not produced by the People. Once again we are presented with the issue of balancing the public interest in protecting the flow of information against the individual's

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right to prepare his defense. It is clearly the law in this state that it is not always necessary for the People to produce informers. People v. Mack, 12 Ill.2d 151, 145 N.E.2d 609; People v. Connie, 34 Ill.2d 353, 215 N.E.2d 280. In People v. Mack, supra, the Illinois Supreme Court held it was not error to refuse to disclose the identity of the informer who signed the search warrant where the informer did not participate in the crime, or help in setting it up, or offer evidence in the case. On a review of the evidence we find no evidence that the informer participated in any way in the crime. Nor did she testify at the trial. We are compelled to hold that the failure of the state to produce the informer who signed the complaint was not error requiring a reversal of the trial court's refusal to allow the motion to quash the search warrant.

Appellant's final contention is that the admissions he made to the police were involuntary and inadmissible. The police testified that the appellant freely admitted to them that the narcotics found in the apartment were his. Appellant claimed that he was physically abused during the course of his trial. The police denied the appellant's claim. There was no motion to suppress the oral confession nor was there objection to its admission at the trial. In view of the above facts we hold that the admission was voluntary and that the weight and credibility to be given it was properly a question for the jury.

For the above reasons the judgment of the trial court is affirmed.

AFFIRMED.

LYONS, J., and BURKE, J., concur.